AFRICAN HUMAN RIGHTS LAW REPORTS 2009

Pretoria University Law Press
PULP

2011

African human rights law reports
2009

Published by:

Pretoria University Law Press (PULP)

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ISSN: 1812-2418

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The *African Human Rights Law Reports* include cases decided by the United Nations human rights treaty bodies, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, sub-regional courts in Africa and domestic judgments from different African countries. The *Reports* are a joint publication of the African Commission on Human and Peoples' Rights and the Centre for Human Rights, University of Pretoria, South Africa. PULP also publishes the French version of these *Reports, Recueil Africain des Décisions des Droits Humains*.

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USER GUIDE

The cases and findings in the *Reports* are grouped together according to their origin, namely, the United Nations, the African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, sub-regional courts and domestic courts.

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A headnote, to be found at the top of each case, provides the full original title of the case as well as keywords noting the primary issues in the case. These are linked to the keywords in the *Subject index*. Keywords are followed by the numbers of the paragraphs in which a specific issue is dealt with. In instances where the original case contains no paragraph numbers these have been added in square brackets.

The date at the end of a case reference refers to the date the case was decided. The abbreviation before the date indicates the jurisdiction.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CCPR	International Covenant on Civil and Political Rights
ECOWAS	Economic Community of West African States
HRC	United Nations Human Rights Committee
GhHC	High Court, Ghana
MwHC	High Court, Malawi

CASE LAW ON THE INTERNET

Case law concerning human rights in Africa may be found on the following sites:

United Nations High Commissioner for Human Rights
www.ohchr.org

African Commission on Human and Peoples' Rights
www.achpr.org

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www.african-court.org

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

Oxford Reports on International Law (ORIL)
www.oxfordlawreports.com

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www.commonlii.org

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Court of Appeal, Nigeria
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UNITED NATIONS HUMAN RIGHTS TREATY BODIES

DEMOCRATIC REPUBLIC OF THE CONGO

Basongo Bondonga v Democratic Republic of the Congo

(2009) AHRLR 3 (HRC 2009)

Communication 1483/2006**,** *Philémon Basongo Bondonga (represented by counsel, Dieudonné Diku) v Democratic Republic of Congo*

Decided at 96th session, 30 July 2009, CCPR/C/96/D/1483/2006

Torture by members of the armed forces

Admissibility (no response from state party, 4; consideration by other international body, 5.2; exhaustion of domestic remedies, 5.3)
Cruel, inhuman or degrading treatment or punishment, (corporal punishment, 6.2)
Fair trial (duty of state to respect judgments, 6.2)
Remedies (compensation, 8; failure to enforce sentence, 6.2)

1. The author of the communication, dated 10 March 2004, is Philémon Basongo Bondonga, a citizen of the Democratic Republic of the Congo, born in Kinshasa on 25 May 1984. He has submitted the communication on behalf of his father, Baudouin Basongo Kibaya, a citizen of the Democratic Republic of the Congo, born in Kisangani on 15 May 1954, who died on 7 March 2004 of causes unrelated to the events described below. The author claims that his father was a victim of violations by the Democratic Republic of the Congo of article 7 and article 2(3)(c), of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for the Democratic Republic of the Congo on 1 November 1976.The author is represented by counsel, Dieudonné Diku.

Facts as submitted by the author

2.1. On 23 April 2001, Lieutenant Basongo Kibaya was forced to hand over his service weapon to Albert Kifwa Mukuna, commander of the Lukunga district, headquartered in the Lufungula camp. He immediately reported the matter to his superior officers in order to

avoid being punished for losing his weapon. After he had done so, Commander Albert Kifwa Mukuna ordered his arrest on 30 April 2001. At approximately 11 pm on that same day, the commander went with his two bodyguards, Joel Betikumesu and John Askari, to Baudouin Basongo Kabaya's cell and ordered that Mr Basongo be given 400 lashes on the buttocks. As a result of this torture, Mr Baudouin Basongo Kibaya became sexually impotent.

2.2. On 4 May 2001, Mr Baudouin Basongo Kibaya lodged a complaint with the Office of the Prosecutor-General of the Military Court against Commander Albert Kifwa Mukuna for arbitrary arrest and physical torture. In October 2002, following several months of investigations, the Military Prosecutor's Office scheduled the case for a hearing by the Military Court. On 29 January 2003, the Military Court sentenced Commander Albert Kifwa Mukuna to a term of imprisonment of 12 months and ordered him to pay damages of 250 000 Congolese francs (the equivalent of 400 United States dollars). His two bodyguards were each sentenced to six months of imprisonment.

2.3. The public prosecution service responsible for enforcing sentences left Albert Kifwa Mukuna and his two bodyguards at liberty, despite the fact that the men had been convicted.

Complaint

3.1. The author maintains that there was a violation of article 7 and of article 2(3)(c), of the International Covenant on Civil and Political Rights.

3.2. The author considers the sentence which the Military Court handed down to the torturers to be unusually lenient and claims that he was unable to make use of effective remedies. He further maintains that the sentence was not enforced, even though the enforcement of sentences is one of the functions of the public prosecution service.

3.3. As far as the exhaustion of domestic remedies is concerned, the author argues that it was not possible to file an ordinary appeal against the Military Court's judgment, as the court heard and decided the case at first and last instance. He refers to Act 023/2002 of 18 November 2002 concerning the Military Code of Justice, article 378 of which stipulates that 'Military Court decisions which acquire the force of *res judicata* are not governed by the present Act'. Moreover, this court was abolished in March 2003 and it pronounced only the operative part of its judgments, without issuing an executory copy or any copy thereof. The author furthermore states that, under Congolese law, the grounds for filing an appeal are incompetence and a breach of law, *inter alia*; neither of these two conditions obtains in the particular case before the Committee.

Lack of cooperation by the state party

4. In *notes verbales* dated 18 July 2006, 8 June 2007, 29 July 2008 and 18 February 2009, the state party was requested to convey information to the Committee on the admissibility and merits of the communication. The Committee notes that it did not receive the requested information. It regrets that the state party did not supply any relevant information on the admissibility or the merits of the author's allegations. It recalls that, under the Optional Protocol, the state concerned is required to submit to the Committee written explanations or statements clarifying the matter and indicating what remedies, if any, may have been taken. In the absence of a reply of any kind from the state party, the Committee must give due weight to the author's allegations insofar as they have been sufficiently substantiated.

Issues and proceedings before the Committee

Consideration of admissibility

5.1. Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether or not the communication is admissible under the Optional Protocol to the Covenant.

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

5.3. Having taken note of the author's arguments concerning the exhaustion of domestic remedies and taking into account the lack of cooperation by the state party, the Committee concludes that there is nothing in article 5(2)(b) of the Optional Protocol to prevent it from considering the communication. The Committee further concludes that the facts presented by the author have been sufficiently substantiated for the purposes of article 7 and article 2(3)(c) of the Covenant. Accordingly, it decides that the communication is admissible and proceeds to consider it on the merits.

Consideration on the merits

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

6.2. With regard to the allegation of a violation of article 7 and of article 2(3)(c) of the Covenant, the Committee notes the author's allegation that his father was detained and whipped by Commander Kifwa Mukuna's bodyguards, on the Commander's orders, for reporting the forcible removal of his weapon. The Committee also

notes the author's allegation that the public prosecution service failed to enforce the relatively light sentence handed down by the Military Court, since the convicted persons never served their prison terms. In the absence of any relevant information from the state party which might contradict the author's allegations, the Committee considers that the facts laid before it reveal a violation of article 7, together with article 2, of the Covenant.

7. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it reveals a violation of article 7, together with article 2, of the Covenant.

8. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the author with an effective remedy, including appropriate compensation. The state party is under an obligation to enforce the ruling of the Military Court of 29 January 2003. It is also under an obligation to ensure that similar violations do not occur in future.

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

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

CAMEROON

Gunme and Others v Cameroon

(2009) AHRLR 9 (ACHPR 2009)

Communication 266/03, *Kevin Mgwanga Gunme et al v Cameroon*

Decided at the 45th ordinary session, May 2009, 26th Activity Report

Discrimination against and marginalisation of the people of Anglophone Cameroon

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Summary of facts

1. The complainants are 14 individuals who brought the communication on their behalf and on behalf of the people of Southern Cameroon[1] against the Republic of Cameroon, a state party to the African Charter on Human and Peoples' Rights.

2. The complainants allege violations which can be traced to the period shortly after *La Republique du Cameroun* became independent on 1 January 1960. The complainants state that Southern Cameroon was a United Nations trust territory administered by the British, separately from the Francophone part of the Republic of Cameroon, itself a French administered United Nations trust territory. Both became UN trust territories at the end of the 2nd World War, on 13 December 1946 under the UN trusteeship system.

3. The complainants allege that during the 1961 UN plebiscite, Southern Cameroonians were offered 'two alternatives', namely: a choice to join Nigeria or Cameroon. They voted for the later. Subsequently, Southern Cameroon and La République du Cameroun, negotiated and adopted the September 1961 Federal Constitution, at Foumban, leading to the formation of the Federal Republic of Cameroon on 1 October 1961. The complainants allege further that the UN plebiscite ignored a third alternative, namely the right to independence and statehood for Southern Cameroon.

4. The complainants allege that the overwhelming majority of Southern Cameroonians preferred independence to the two alternatives offered during the UN plebiscite. They favoured a prolonged period of trusteeship to allow for further evaluation of a third alternative. They allege further that the September 1961 Federal Constitution did not receive the endorsement of the Southern Cameroon House of Assembly.

5. The complainants allege that the violations suffered by the people of Southern Cameroon emanate from the UN plebiscite of 11 February 1961 organised to determine the political future of Southern Cameroon, and the failure by the respondent state to abide by the 1961 Federal Constitution.

6. They allege that on 1 October 1961 *La Republique du Cameroun*, with the tacit approval of the British government, drafted gendarmes, police and soldiers from the Francophone side into Southern Cameroon, which amounted to 'forceful annexation' of

[1] The use of the term 'Southern Cameroon' in this Communication is not intended to confer any legal status or recognition. The words 'Southern Cameroon' describe the territory of the respondent state where violations are alleged to have occurred. Unless otherwise expressly stated, the terms 'Southern Cameroonians', 'Anglophones', or 'Francophones' describe the people said to occupy the two parts of the Republic of Cameroon, which were prior to 1 January 1961 either English or French administered UN trust territories respectively.

Southern Cameroon. They allege that, '[a]t no time was sovereignty over Southern Cameroon transferred to a new Federal United Cameroons or any other entity.' They argue that the failure to exercise the third alternative, impacted negatively on the right of the people of Southern Cameroon to self determination.

7. The complainants allege further that 'notwithstanding the forceful annexation', the people of Southern Cameroon remained a separate and distinct people. Their official working language is English, whereas the people in *La Republique du Cameroun* are Francophones. The legal, educational and cultural traditions of the two parts remained different, as was the character of local administration. In spite of the foregoing, they allege further that the respondent state manipulated demographic data to deny the people of Southern Cameroon equal rights to representation in government. They allege that the people of Southern Cameroon have been denied powerful positions within the national/federal government. They claim that the September 1961 Federal Constitution was designed to respect those differences.

8. The complainants allege further that from the outset of unification in 1961, and the declaration of a unitary state in 1972, Southern Cameroonians remain marginalised. They allege that Southern Cameroon was allocated 20% instead of 22% of the seats in the Federal/National Assembly, as per the population ratio, thus denying them equal representation. They allege that in 1961 West Cameroon was allocated 20 representatives in the Federal Assembly instead of 26. Later when representation to the Assembly was expanded to 180 representatives, West Cameroon was allocated 35 representatives, instead of 40 representatives. The complainants allege further that the Francophones occupy local administrative positions in Southern Cameroon, and abuse their positions to amass land, and access economic resources, while the Southern Cameroonians play the minutest role at the local or national level.

9. It is further alleged that several towns in Southern Cameroon were denied basic infrastructure, hence denying them the right to development. It is alleged that the respondent state, relocated or located various economic enterprises and projects, such as the Chad-Cameroon Oil Pipeline, the deep seaport, and the oil refinery to towns and cities in Francophone Cameroon, notwithstanding their lack of economic viability, thereby denying employment opportunities and secondary economic benefits to the people of Southern Cameroon.

10. The complainants allege further that the Francophones have monopolistic control of the Ministry of National Education. That the respondent state has under funded primary education in Southern Cameroon, it failed to build new schools, understaffed primary schools, and it is closing all teacher training colleges. They allege

further that the respondent state 'Cameroonised' the GCE from the University of London, leading to mass protests which forced government to create an independent GCE Board. That, upon unification, diplomas awarded by the City & Guild, a technical education institution based in England, were replaced by the *Certificat d'Aptitude Professionale* (CAP) and the *BAC Technique*. These measures have resulted in persistent high levels of illiteracy in many areas in Southern Cameroon.

11. The complainants allege that political unification and the application of the civil law system resulted in the discrimination against Anglophones in the legal and judicial system. Southern Cameroonian companies and businesses were forced to operate under the civil law system. The Companies Ordinance of the Federation of Nigeria, which was until then applicable in Southern Cameroon, was abolished. Many Southern Cameroonian businesses went bankrupt, following the refusal by Francophone banks to lend them finances, in some cases, unless their articles of association were drafted in French.

12. They allege that Anglophones facing criminal charges were transferred to the Francophone zone for trial, under the Napoleonic Code, thereby adversely affecting their civil rights. The complainants state that the common law presumption of innocence upon arrest is not recognised under the civil law tradition, since guilt is presumed upon arrest and detention. The courts conduct trial in the French language without interpreters. Furthermore, they allege that Southern Cameroon court decisions are ignored by the respondent state.

13. The complainants allege that the entry by the Respondent State as a State Party to the *Organisation pour l'Harmonisation des Droits d'Affaires en Afrique* (OHADA), a treaty for the harmonisation of business legislation amongst Francophone countries in Africa, constituted discrimination against the people of Southern Cameroon on the basis of language. OHADA stipulates that the language of interpretation of the treaty shall be French. The Complainants argue that the Constitution recognises English and French as the official languages of Cameroon. They argue therefore that by signing the OHADA treaty, Cameroon violated the language rights of the English speaking people of Cameroon. They allege that any company not registered under the OHADA law cannot open a bank account in Cameroon.

14. The complainants allege further that, on 3 April 1993, representatives of the people of Anglophone Cameroon adopted the Buea Declaration, which declared the preparedness of the Anglophones ' ... to participate in the forthcoming constitutional talks with their Francophone brothers ...'. The Declaration stated that;

(1) the imposition of the Unitary State on Anglophone Cameroon in 1972 was unconstitutional, illegal and a breach of faith,

(2) That the only redress adequate to right the wrongs done to Anglophone Cameroon and its people since the imposition of the Unitary state is a return to the original form of government of the Reunified Cameroon,

(3) That to this end, all Cameroonians of Anglophone heritage are committed to working for the restoration of a federal Constitution and a federal form of government, which takes cognizance of the bicultural nature of Cameroon and under which citizens shall be protected against such violations as have been enumerated,

(4) That the survival of Cameroon in peace and harmony depends upon the attainment of this objective towards which all patriotic Cameroonians, Francophones as well as Anglophones, should relentlessly work.

15. Subsequent to the 1993 Buea Declaration, it is alleged that between 29 April and 1 May 1994, the Second Anglophone Conference convened in Bamenda adopted the Bamenda Proclamation, which stated, *inter alia*, that:

> one year since the Anglophone constitutional proposals were officially submitted, the government had not reacted to them; that all efforts to generate the interest and understanding of the Francophone officials and Francophone public generally in the Anglophone constitutional proposals had been greeted with responses ranging from indifference through apathy to hostility ... IN THE LIGHT OF THE FOREGOING the Anglophone people of Cameroon ...; reiterated the Resolution taken at its first session in April 1993 ... It stated further in paragraph 6 of the Proclamation that; 6. Should the Government either persist in its refusal to engage in meaningful constitutional talks or fail to engage in such talks within a reasonable time, the Anglophone Council shall inform the Anglophone people by all suitable means. It shall, thereupon, proclaim the revival of the independence and sovereignty of the Anglophone territory of Southern Cameroon and take all measures necessary to secure, defend and preserve the independence, sovereignty and integrity of the said territory.

16. The complainants allege that the failure by the respondent state to address the concerns of the Southern Cameroon people for a new constitution, coupled with the adoption of the 1995 December Constitution by the National Assembly of *La Republique du Cameroun* without public debate, meant that the door was being finally closed on any future constitutional links between the Southern Cameroon and *La Republique du Cameroun*. Henceforth, the complainants decided to conduct a signature referendum, in view of 'the hostile atmosphere created by the occupying power ... which would not want to allow any form of consultation which might reveal the true suppressed aspirations of the people of Southern Cameroons.'

17. The complainants aver that between 1 and 30 September 1995, the Southern Cameroons National Council (SCNC) conducted a signature referendum which revealed that 99% of Southern Cameroonians favour full independence by peaceful separation from the respondent state.

18. Besides their claim for statehood, the complainants allege further that human rights of various individuals have been

systematically violated by the respondent state. The complainants compiled eye witness accounts and field investigations relating to arbitrary arrests, detentions, torture, punishment, maiming and killings of persons who have advocated for the self determination of Southern Cameroon.

Complaint

19. The complainants allege that:

(1) Articles 2, 3, 4, 5, 6, 7(1), 9, 10, 11, 12, 13, 17(1), 19, 20, 21, 22, 23(1), 24 of the African Charter have been violated.

(2) The Republic of Cameroon has violated its general duty under article 26 of the African Charter to guarantee the independence of the judiciary.

Procedure

20. The complaint was received at the Secretariat of the African Commission on 9 January 2003.

21. On 10 January 2003, the Secretariat acknowledged receipt of the complaint.

22. On 19 January 2003, the Secretariat wrote another letter to the complainants requesting for further information relating to the communication.

23. On 21 April 2003, the Secretariat sent a reminder to the complainants requesting them to forward their clarifications. By a letter dated 8 May 2003, Counsel for the complainants sent the clarifications sought by the Secretariat.

24. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission considered the communication and decided to be seized of the matter.

25. On 9 June 2003, the Secretariat informed the parties that the African Commission had been seized with the matter and requested them to forward their submissions on admissibility within three months.

26. On 9 September 2003, the complainants informed the Secretariat that they would be forwarding their submissions on admissibility and requested to make oral submissions at the 34th session of the African Commission.

27. On 22 September 2003, the Secretariat received the complainant's submissions on admissibility along with supplemental evidence. The Secretariat acknowledged receipt thereof on the same day.

28. On 3 October 2003, the respondent state informed the Secretariat that it had not received a copy of the communication forwarded to it by DHL on 9 June 2003.

29. On 6 October 2003, the Secretariat wrote to the complainant requesting for another copy of the supplemental evidence to be forwarded to the respondent state.

30. On 27 October 2003, the Secretariat transmitted a copy of the complainant's submissions on admissibility to the respondent state and informed the latter that the Secretariat would give the accompanying documents to the delegation of Cameroon attending the 34th ordinary session. The Secretariat also informed the respondent state that the DHL office in Cameroon had confirmed delivery of the communication.

31. On 27 October 2003, the Secretariat received another copy of the supplemental evidence from the complainant for onward transmission to the respondent state. The Secretariat acknowledged receipt of the same.

32. At its 34th ordinary session held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission examined the matter and decided to defer consideration on admissibility of the matter to the 35th ordinary session because the respondent state claimed that they were unaware of the communication.

33. On 14 November 2003, the Secretariat furnished the delegates representing the respondent state at the 34th ordinary session with the following documents: A copy of communication 266/2003; a copy of the complainants' submissions on admissibility and the accompanying documents.

34. On 4 December 2003, both parties to the communication were informed of the decision of the African Commission to defer consideration of the matter on admissibility to the 35th ordinary session. The respondent state was reminded to forward its submissions on admissibility to the Secretariat of the African Commission within three months.

35. On 5 March 2004, the Secretariat of the African Commission received the respondent state's submissions on admissibility and acknowledged receipt of the same on 9 March 2004.

36. At its 35th ordinary session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission heard the oral submissions of the parties, and declared the communication admissible.

37. On 15 June 2004, the Secretariat informed the parties about the African Commission's decision and requested them to submit their written submissions on the merits within three months.

38. On 13 August 2004, the Secretariat of the African Commission received a correspondence from the respondent state, which was forwarded to the complainant on 26 August 2004.

39. On 20 September 2004, the Secretariat received the written submissions of the respondent state on merits, which was transmitted to the complainants on 12 November 2004.

40. On 23 and 28 September 2004, the Secretariat received the written submissions of the Complainants on the merits, which was transmitted to the respondent state on 12 November 2004.

41. At its 36th ordinary session held in Dakar, Senegal from 24 November to 7 December 2004, the African Commission decided to defer its consideration on the merits to the next session. It also rejected an application to stay the proceedings by third parties purporting to represent the applicants claiming to have entered into negotiation with the respondent state.

42. On 23 December 2004, the Secretariat wrote to the said third parties informing them of this decision.

43. The Commission also decided to forward the decision on admissibility of the communication to the respondent state, upon its request.

44. On 30 March 2005, the Secretariat received further submissions from the complainants, who also requested to make an oral presentation to the next session.

45. On 31 March 2005, the Secretariat handed over copies of the decision on admissibility and the various submissions from the complainants to the delegation of the respondent state that visited the Secretariat on the same date.

46. At the 37th ordinary session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission considered this communication and decided to defer its decision to the 38th ordinary session.

47. On 7 May 2005, the Secretariat informed the respondent state of this decision.

48. The complainants were notified of the decision on 13 May 2005.

49. On 7 June 2005, the Secretariat received submissions from the complainant, which were sent to the respondent state.

50. On 12 July 2005, the Secretariat received submissions from the respondent state, which were later sent to the complainant.

51. At the 38th ordinary session held from 21 November-5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the merits to the 39th ordinary session.

52. On 30 January 2006, the Secretariat informed the respondent state of this decision.

53. The complainants were notified of this decision on 5 February 2006.

54. At the 39th ordinary session held in Banjul, The Gambia, from 11 to 25 May 2006, the African Commission considered the communication and decided to defer it for further consideration at the 40th ordinary session.

55. At the 40th ordinary session held in Banjul, The Gambia from 14 to 28 November 2006, the African Commission considered the communication and decided to defer its decision on the merits to the 41st session.

56. At the 41st ordinary session held in Accra, Ghana, from 16 to 30 May 2007 the Commission considered the communication and deferred its decision to allow more time for the Secretariat to conduct further research and finalise the draft decision.

57. At the 42nd ordinary session held in Brazzaville, Congo, from 14 to 28 November 2007, the African Commission considered the communication and decided to defer it for further consideration at the 43rd ordinary session.

58. At the 43rd ordinary session held in Ezulwini, Swaziland, from 7 to 22 May 2008, the African Commission considered the communication and decided to defer its decision on the merits to the 44th ordinary session.

59. At the 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008, the African Commission considered the communication and decided to defer it to the 45th ordinary session in order to finalise the draft decision on the merits.

60. During the 6th extra-ordinary session held from 28 March to 3 April 2009 in Banjul, The Gambia, the Commission considered the communication and resolved to finalise it during the 45th ordinary session.

61. At the 45th ordinary session held in Banjul, The Gambia, between 13 and 27 May 2009, the Commission adopted the decision on the merits of the communication.

Law

Admissibility

62. The admissibility of communications brought pursuant to article 55 of the African Charter is governed by the conditions stipulated in article 56 of the African Charter. This article lays down seven conditions, which must be fulfilled by a complainant for a communication to be declared admissible.

63. Of the seven conditions, the respondent state claims that the complainants have not fulfilled four, namely: articles 56(1), (2), (3) and (4). From the submissions of the respondent state, there is an inference that article 56(7) has not been fulfilled by the complainant.

64. The respondent state submits that contrary to article 56(1) of the African Charter, the victims of the alleged violations, indicated in the communication have not been identified.

65. Article 56(1) of the African Charter provides that: 'Communications ... received by the Commission shall be considered if they: (1) indicate their authors even if the latter request anonymity.'

66. In this particular matter, the African Commission notes that the authors of the communication have been identified at page 1 of the communication and they are 14 in number. Their ages and professions have also been given as well as their addresses of service. Furthermore, the communication reveals that the authors of the communication are members of the Southern Cameroons National Council (SCNC) and the Southern Cameroons Peoples' Organisation (SCAPO), organisations that were established principally to protect and advance the human and peoples' rights of Southern Cameroonians, including their right to self-determination.

67. Article 56(1) of the African Charter requires a communication to indicate its authors and not the victims of the violations. Thus the present communication cannot be declared inadmissible on the basis of article 56(1). In coming to this decision, the African Commission would like to refer to its decision in consolidated communication — *Malawi African Association and Others v Mauritania*[2] where it held that 'article 56(1) demands simply that communications should indicate the names of those submitting and not those of all the victims of the alleged violations'.

68. The respondent state argues that this communication does not meet the requirements of article 56(2), because the complainants are advocating for secession under the pretext of allegations of violation of the provisions of the African Charter and other universal human rights instruments. While conceding that the right to self-determination is an inalienable right, the respondent state argues that the UN has established that this right should not 'be interpreted as authorising or encouraging any measure that would partly or wholly compromise the entire territory or the political unity of sovereign and independent states'. The respondent state submits further that it is established that the only entities likely as peoples to call for the external right to self-determination from preexisting states are the 'peoples under foreign subjugation, domination and exploitation'.

2 Consolidated Communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98 [(2000) AHRLR 149 (ACHPR 2000)].

69. The complainants argue that the communication meets the requirements in article 56(2) because it alleges violations of the African Charter and other international human rights instruments.

70. Article 56(2) provides that 'Communications ... received by the African Commission shall be considered if they: (2) are compatible with the Charter of the Organisation of African Unity or with the present Charter.'

71. The condition relating to compatibility with the African Charter basically requires that:

- The communication should be brought against a state party to the African Charter;[3]
- The communication must allege *prima facie* violations of rights protected by the African Charter;[4]
- The communication should be brought in respect of violations that occurred after the state's ratification of the African Charter, or where violations began before the state party ratified the African Charter, have continued even after such ratification.[5]

72. It is apparent to the African Commission that the present communication meets all the above requirements. The communication has been brought against Cameroon, which is state party to the African Charter. It reveals *prima facie* violations of the African Charter, all of which are alleged to have continued to occur following Cameroon's ratification of the African Charter.

73. The respondent state also submits that the communication has been written in disparaging or insulting language. The respondent state argues that the complainants' use of the phrases such as 'forceful annexation' and 'state sponsored terrorism' to characterise violations by the government of Cameroon against the people of Southern Cameroon, allegedly committed between 1961 and 2002 and a report titled 'Let My People Go Part II', are disparaging and insulting language, contrary to article 56(3) of he African Charter.

74. Article 56(3) of the African Charter provides that: 'Communications ... received by the Commission shall be considered if they: (3) are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity.'

75. The African Commission acknowledges that the above-mentioned provision is quite subjective because statements that could be disparaging or insulting to one person may not be seen in the same light by another person. Matters relating to human rights violations normally elicit strong language from the victims of the said violations. Nonetheless complainants should endeavour to be

3 Communication 2/88, *Ihebereme v United States of America*.
4 Communication 1/88, *Korvah v Liberia* [(2000) AHRLR 140 (ACHPR 1988)].
5 Communication 97/93, *Modise v Botswana* [(2000) AHRLR 30 (ACHPR 2000)].

respectful in the phrases they choose to use when presenting their communications.

76. The respondent state submits further that the complainants are not the sole authors of some of the documents and that the facts have been distorted.

77. The complainants submit that they did not author the offensive publication, but rely on it to buttress their allegations. They argue further that the communication is not based exclusively on news disseminated through the media. They state that the evidence in support of their allegations is based on eye-witness accounts and documents prepared by those who have personal knowledge of the events and from official records.

78. Article 56(4) of the African Charter provides that: 'Communications ... received by the Commission shall be considered if they: (4) are not based exclusively on news disseminated through the mass media '

79. The African Commission has perused the appendices to the communication and has observed that they contain the following documents:

- Appendix II is a publication by SCNC/SCAPO — *Let my People Go!*
- Appendix IV contains court documents, namely a motion on notice, 2 affidavits, originating summons, a ruling of the Federal High Court of Nigeria in Abuja, terms agreed by the parties to be embodied in the order of the court and an enrolment of order.
- Exhibit SC contains among others numerous documents, declarations, agreements between Germany and Great Britain, UN General Assembly Resolutions, the Statute of the International Court of Justice and the UN Charter, a Petition made by the Federal Republic of Southern Cameroons to the United Nations etc.

80. Article 56(4) relates to communications brought before the African Commission based exclusively on news disseminated through the mass media. Looking at the nature of documents described herein above, it is quite clear that the complainants do not base their case on mass media news, but on official records and documents, as well as international statutes. This clearly falls outside the ambit of article 56(4).

81. With respect to article 56(5), which relates to exhaustion of local remedies, the complainants submit that there are no local remedies to exhaust in respect of the claim for self-determination because this is a matter for an international forum and not a domestic one. They argue that the issue for determination in this communication is whether or not the 'union' of *La République du Cameroun* and Southern Cameroons was effected in accordance with UN resolutions, international treaty obligations and indeed International law. They assert that the right to self-determination is a matter that cannot be determined by a domestic court.

82. The respondent state concedes that no local remedies exist with respect to the claim for self determination. The respondent state, however argues that, the right to self-determination for the people of Southern Cameroon was solved when the British trusteeship over British Cameroon ended following the plebiscite of 11 and 12 February 1961. Furthermore, it argues that the 1963 International Court of Justice (ICJ) decision in the Northern Cameroon case found in favour of the Republic of Cameroon and put the matter of Southern Cameroon to rest. The respondent state believes that the complainants are seeking a similar declaratory decision which should not be entertained by the African Commission.

83. The African Commission believes that this argument is an inference by the respondent state that the Complainants have not met the conditions laid down in article 56(7) of the African Charter. Article 56(7) provides:

> Communications ... received by the African Commission shall be considered if they: (7) do not deal with cases which have been settled by the states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter.

84. Article 56(7) of the African Charter bars the African Commission from entertaining cases that have been settled by another international settlement procedure.[6] The issue that the African Commission needs to examine is whether the abovementioned complaint has been settled by some other international settlement procedure.

85. The African Commission has read the judgment of the ICJ in the *Northern Cameroons* case.[7] In that case the government of the Republic of Cameroon asked the Court to declare whether, 'in the application of the Trusteeship Agreement for the Territory of the Cameroons under the British Administration, the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations flowing from that Agreement.'[8]

86. It is the view of the African Commission that the matter before the ICJ was unrelated to the issues before the African Commission. The African Commission states that for a matter to fall within the scope of article 56(7) of the African Charter it should have involved the same parties, the same issues, raised by the complaint before the African Commission, and must have been settled by an international or regional mechanism. The case before the ICJ was between the Republic of Cameroon and the United Kingdom, and involved the interpretation and application of the Trusteeship treaty. These facts clearly differ from the complaint before the Commission. As such the case falls outside the scope of article 56(7) of the African Charter.

6 Communication 15/88, *Mpaka-Nsusu v Zaire* [(2000) AHRLR 71 (ACHPR 1994)].
7 *Cameroon v United Kingdom*, judgment of 2 December 1963.
8 As above.

87. For the reasons outlined herein above, the African Commission declares this communication admissible.

Preliminary issue raised by the respondent state regarding the jurisdiction of the African Commission

88. Before dwelling on the substance of the allegations, the Commission wishes to dispose of some preliminary legal issues raised by the respondent state. The respondent state questions the Commission's jurisdiction *rationae temporis*, and states the following:

> the complaint by the complainants contains an impressive number of cases of so called massive violations of human rights which [are] alleged to have been carried out between 1961 and 2002. In this regard, the State of Cameroon refuses to acknowledge in *limine litis* the jurisdiction *rationae temporis* of the Commission with regard to acts before 18 December 1989, the date of entry into force of the Charter.

89. The respondent state also challenged the notion, or the existence of a territory known as 'Southern Cameroon'. It states as follows:

> It should be pointed out that in spite of the fact that the complainants refused to reveal their identities, they by no means ascertained to have been victims[9] of violations imputed to the State of Cameroon. And even when they act on behalf of a so called territory called Southern Cameroon. The State of Cameroon will point out that no territory exists called as such in the Republic of Cameroon ...

90. The respondent state, similarly, questions the existence of a 'people' known as 'Southern Cameroonians' and as such states that, '[s]upposing that there are a people of Southern Cameroons, nevertheless, it would have to be proven that it is entitled to claim its self determination, under the specific form of "separate statehood".'

91. The Commission proposes to deal, firstly, with the question of its jurisdiction then the question whether the people of 'Southern Cameroon' exist as a 'people' and whether the territory otherwise referred to as 'Southern Cameroon' does exist, and if it does, can its 'people' exercise their alleged right to self-determination?

Decision on the preliminary issue of the Commission's jurisdiction *rationae temporis*

92. The respondent state raises objection to the Commission's exercise of jurisdiction *rationae temporis*. The complainants responded that although those violations were carried out before the African Charter came into force for Cameroon, they did not stop even after 18 December 1989.

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9 The issue whether or not a complainant needs to be a victim in order to submit a communication before the Commission is addressed, in para 62 hereinabove, when discussing article 56(1) of the African Charter.

93. The Commission acknowledges the respondent state's argument that its jurisdiction *rationae temporis* is limited *in limine*, and as such it cannot address violations [before] the entry into force of the Charter. The Commission is aware that the Africa Charter entered into force in respect of the respondent state on 18 December 1989. The Commission has been informed by the Complainants that some of the alleged violations occurred before that date.

94. The Commission stated its position on this principle in *Modise v Botswana*. In that communication the complainant was arrested by the Botswana authorities in 1978 and deported to apartheid South Africa, in violation of his citizenship rights. The communication was filed in 1993. The Commission held that:

> The Republic of Botswana ratified the African Charter on 17 July 1986. Although some of the events described in the communication took place before ratification, their effects continue to the present day. The current circumstances of the Complainant are a result of a present policy decision taken by the Botswana government against him.

95. The Commission expanded the principle further in its decision in *Malawi African Association and Others v Mauritania*, where it, *inter alia*, considered an allegation of violations of the right to a fair trial. The Commission held that:

> Mauritania ratified the Charter on 14 June 1986, and it came into force on 21 October 1986. The September trials, thus took place prior to the entry into force of the Charter. These trials led to the imprisonment of various persons. The Commission can only consider a violation that took place prior to the entry into force of the Charter if such a violation continues or has effects which themselves constitute violations after the entry into force of the Charter ...[10]

96. The Commission has through its jurisprudence established the principle that violations that occurred prior to the entry into force of the Charter, in respect of a state party, shall be deemed to be within the jurisdiction *ratione temporis* of the Commission, if they continue, after the entry into force of the Charter. The effects of such violations may themselves constitute violations under the Charter. In other words, this principle presupposes the failure by the state party to adopt measures, as required by article 1 of the African Charter to redress the violations and their effects, hence failing to respect, and guarantee the rights.

97. The Commission therefore decides that it has the competence to consider this complaint against the respondent state, in relation to violations which emanated prior to 18 December 1989, the date the African Charter entered into force for the Republic of Cameroon, if such violations or their residual effects continued after that date.

[10] Consolidated communications 54/91, 61/91, 98/93, 164/97-196/97, 210/98 [(2000) AHRLR 149 (ACHPR 2000)] para 91.

Consideration of the merits

98. The communication alleges that the respondent state violated articles 2, 3, 4, 5, 6, 7(1), 9, 10, 11, 12, 13, 17(1) in respect of individual Southern Cameroonians; and articles 19, 20, 21, 22, 23(1) and 24 in respect of the peoples of Southern Cameroons; and the general obligation under article 26 of the African Charter.

Decision on the merits

Alleged violation of article 2

99. The complainants allege that there have been various cases of discrimination against the people of Southern Cameroon contrary to article 2 of the African Charter. Article 2 states that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

100. The complainants submit that Southern Cameroonians are discriminated against by the respondent state, in various forms. These include under-representation of Southern Cameroonians in national institutions, economic marginalisation through the denial of basic infrastructure, such as roads, persistence high levels of unemployment and illiteracy in Southern Cameroon. It is submitted that Southern Cameroonians are discriminated against in the legal and judicial system.

101. The complainants submitted further that the company law applied in Southern Cameroon was abolished in favour of the Napoleonic Code upon unification in 1972. They argued that Southern Cameroonians could not register companies whose articles of association were in the English language.

102. The issue for determination is whether the refusal to register the said companies was directly related to the unification of the legal system in 1972, and if it constituted discrimination? Could the 1972 unification prejudice registration of companies after ratification on 18 December 1989? This would be the case only if the unification impacted negatively on the registration of companies after December 1989. The complainants argue that the refusal to register companies had such an effect. In order for the Southern Cameroonian companies to do business they had to register under the Francophone civil law system. The respondent state did not dispute this allegation. English is one of the official languages in Cameroon. Southern Cameroonians had a legitimate expectation that the English language could be used to conduct official business, including the registration of companies. The Commission makes a finding that the refusal to register

companies established by Southern Cameroonians on account of language amounted to a violation of article 2 of the African Charter.

103. The complainants submit further that the ratification of the Treaty for the Harmonisation of Business Law in Africa, otherwise known as *Organisation pour l'harmonisation des droits d'affaires en Afrique* (OHADA), has discriminated against the people of Southern Cameroon on the basis of language. OHADA is an instrument harmonising business law amongst French speaking countries in Africa. It states that the language of interpretation and settlement of disputes arising under OHADA shall be French.

104. The complainants alleged that the ratification of OHADA was discriminatory to individual businesses and business people from Southern Cameroon. At this point we adopt the legal principle that businesses or corporate bodies are legal persons. The complainants submit that objections against OHADA were ignored, and that companies not registered under OHADA could not open bank accounts in Cameroon.

105. The respondent state argued that OHADA is not aimed at promoting the superiority of one legal system over the other, but rather to harmonise business law in the contracting states by elaborating simple, modern, common rules aimed at encouraging regional development and growth, setting up appropriate judicial procedures and encouraging arbitration for the settlement of contractual disputes.

106. It states further that other non French speaking countries, including Ghana and Nigeria, were undergoing the process of acceding to the OHADA treaty. The respondent state submitted that it had taken several measures, such as the translation of the OHADA laws into English, with the support of the OHADA Permanent Secretariat and the African Development Bank, and the training of Anglophone and Francophone magistrates at the *Ecole regionale superieure de la magistature* in Porto Novo, Republic of Benin. It stated further that the apprehension by the Anglophones was merely a transitory situation.

107. The Commission takes note of the fact that the respondent state had taken measures to address the discriminatory effects of the ratification of OHADA. Had such measures not been taken upon the ratification of OHADA in 1996, the Commission would not have hesitated to find a violation. The Commission is cognisant of the bilingual nature of the respondent state and the Western African region, in which the respondent state finds itself. The respondent state is from time to time being expected to interact with its neighbours in ECOWAS, or any other sub regional group, where both the French and the English language continue to be *lingua franca*.

108. The mere accession or ratification of OHADA should not be deemed a violation of article 2, unless the respondent state had manifestly failed to take any steps to ameliorate the effects of the linguistic differences. The respondent state has shown that it took measures, such as the training of magistrates, and translation of texts to address the discriminatory concerns. The OHADA ratification, however, resulted in the discrimination of Anglophone based companies and businesses, which could not open bank accounts unless they registered under OHADA. There was no response from the respondent state on this issue. Nor were any measures taken to address this complaint. Notwithstanding the translation of OHADA into English, it was wrong for institutions, such as banks to force Southern Cameroon based companies to change their basic documents into French. The banks and other institutions could have dealt with the companies without imposing the language conditionality. Banking documents should have been translated into English. The Commission finds that the respondent state failed to address the concerns of Southern Cameroonian businesses, which were forced to re-register under OHADA, and as such violated article 2 of the African Charter.

Allegation of violation of article 3

109. The complainants alleged violation of article 3, which protects the individual's right to equality before the law and equal protection of the law. African Commission notes that although the communication alleges violation of article 3 of the African Charter, the complainants did not specifically argue or bring evidence of any instance against the respondent state. In the absence of such evidence, the African Commission cannot find violation of article 3 of the Charter.

Alleged violation of article 4

110. The complainants allege violations of article 4, the right to life, inviolability of the human being, and the integrity of the person. They submit that the respondent state committed violations against individuals in Southern Cameroon. The communication gives account of people who were killed by the police during violent suppressions of peaceful demonstrations, or died in detention as a result of the bad conditions and the ill-treatment in prison.

111. The respondent state contends that the allegations are not substantiated by documentary evidence. No certificates to ascertain the cause of death, no forensic medical certificates, no investigation reports by human rights organisation were produced. It states further that 'the catalogue published by the press organs of the SCNC and

SCAPO cannot be considered as a reliable source'.[11] The respondent state however, admitted to the death of six people on 26 March 1990, which occurred after a confrontation between security forces and demonstrators, whom it argued, were involved in an illegal political rally in Bamenda.

112. The African Commission observes that the parties do not have equal access to official evidence such as police reports, death certificates and forensic medical certificates. The complainants endeavoured to inquire into the alleged violations and gave names of the alleged victims. The respondent state restricted itself to questioning the reliability of the evidence presented by the Complainants. It did not deny the alleged violations. The respondent state had the opportunity to inquire into the alleged violations. The respondent state did not conduct such investigation and redress the victims, it thus failed to protect the rights of the alleged victims. The Commission finds that it violated article 4 of the African Charter.

Alleged violation of article 5

113. The communication gives details of victims who were subjected to torture, amputations and denial of medical treatment by the respondent state's law enforcement officers, in violation of article 5 of the African Charter. The respondent state responded by stating that some SCNC and SCAPO members had perpetrated terrorist acts in the country, killing law enforcement officers, vandalising state properties, stealing weapons and ammunitions.

114. The Commission holds the view that even if the state was fighting alleged terrorist activities, it was not justified to subject victims to torture, cruel, inhuman and degrading punishment and treatment. It therefore finds that the respondent state violated article 5 of the African Charter.

Alleged violation of article 6

115. The communication further gives details of victims who were arrested, detained for days, sometimes for months without trial before being released in violation of article 6 of the Charter.

116. The respondent state did not deny the allegations instead it tried to justify them. For instance, it states that:

> Concerning citizens who had been arrested for committing various ordinary law offences since the return to multi party democratic processes, most of them are SCNC and SCAPO activists who, in their logic of contestation, defied republican institutions especially the forces of law and order, either during demonstration of the anniversary of 'Southern Cameroon' every 1 October of the year, or at the approach, during and after important elections.

[11] The SCNC (Southern Cameroons National Council) and the SCAPO (Southern Cameroons People's Organisation) are two political organisations defending the rights of the people of Southern Cameroons, including their right to self-determination.

117. It goes on to state that,

> whatever the circumstances, the more it is true that every individual shall have the right to liberty and the security of his person, the more it is accepted that an individual may be deprived of his freedom for reason and conditions previously laid down by the law. (Article 6 of the Charter). The cases of arrest registered since the return to multiparty politics in this part of the territory has always obeyed the principle of legality ...

118. The Commission states that a state party cannot justify violations of the African Charter by relying on the limitation under article 6 of the Charter. The respondent state is required to convince the Commission that the measures or conditions it had put in place were in compliance with article 6 of the Charter. The Commission has previously expressed itself on the effect of claw back clauses. Communication 211/98 *Legal Resources Foundation v Zambia*,[12] states the following;

> The Commission has argued forcefully that no state party to the Charter should avoid its responsibility by recourse to the limitations and "claw back" clauses in the Charter. It was stated following developments in other jurisdictions, that the Charter cannot be used to justify violations of sections of it. The Charter must be interpreted holistically and all clauses must reinforce each other. The purpose or effect of any limitation must also be examined, as the limitation of the right cannot be used to subvert from the popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter.

119. Further to the foregoing, communication 147/95 and 149/96, *Jawara v The Gambia* [(2000) AHRLR 107 (ACHPR 2000)], the Commission stated that:

> The Commission in its decision on communication 101/93 laid down a general principle with respect to freedom of association, that 'competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by constitution or international human rights standards.' This therefore applies not only to right to freedom of expression of association, but also to all other rights and freedoms ... for a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter.[13]

120. In view of the foregoing, the Commission finds that the respondent state has violated article 6 as alleged by the complainants.

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12 [(2001) AHRLR 84 (ACHPR 2001)].

13 The principle was stated in communication 101/93, *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* [(2000) AHRLR 186 (ACHPR 1995)], where the Commission discussed the effect of the claw back clause in article 10 on the right to freedom of association and stated the following; '[f]reedom of association is enunciated as an individual right and is first and foremost a duty of the state to abstain from interfering with the free formation of association. There must always be a general capacity for citizens to join, without State interference, in association in order to attain various ends. In regulating the use of this right, *the competent authorities should not enact provisions which would limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine rights guaranteed by the constitution and international human rights standards*. (emphasis is added)

Alleged violation of article 7(1)

121. The complainants alleged that the respondent state violated article 7(1), on the right to fair trial. They allege that individuals were transferred from Southern Cameroon to Francophone Cameroon for trial by military tribunals and that other victims were tried in civil law courts, without interpreters.

122. The respondent state admits that between 1997 and 2001, some individuals were transferred from the North West Cameroon, and were tried for various criminal offences by the Yaoundé Military Tribunal. These offences include unlawful incitement, disturbances of public peace, destruction of public property, assassination of gendarmes and civilian individuals, illegal possession of weapons and ammunition and the illegal declaration of the independence of Anglophone Cameroon on 30 December 1999.

123. The respondent state asserts the following:

> Aware that in the past the actions of SCNC militants have always ended up in assassinations, kidnapping of persons, destruction and setting ablaze of public buildings, public authorities could not remain indifferent in front of this manifest determination to cause disorder and disturbances. About three days before 1 October 2001, gendarmes were dispatched nearly everywhere in the areas and localities targeted by the SCNC.

124. The respondent state submitted that some of the victims were released, albeit after prolonged periods of detention, for lack of evidence. Others were released on bail, and fled the country. It argues that the prolonged detention was due to administrative bottlenecks, which are a constant concern of the government. The respondent state did not indicate the measures it had taken to address the chronic administrative problems causing prolonged detentions.

125. The respondent state denied that it ignored or failed to implement court decisions in Anglophone Cameroon. It cited a number court decisions it had complied with, including those which overturned executive decisions. The complainant did not give any specific case or decision which was not complied with by the respondent state.

126. The Commission wishes to state that the rights outlined in article 7 constitute fundamental tenets of any democratic state. It is through respect for these rights that other rights guaranteed by the Charter may also be realised. The Commission has adopted the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa, to assist state parties to better guarantee the rights enshrined in article 7.

127. The respondent state did not explain why it transferred individuals from North West Cameroon for trial by the Yaoundé and Bafoussam Military Tribunals, nor the reason why the victims were

tried by tribunals outside the jurisdictions where the offences were allegedly committed. The Commission has stated previously that trial by military courts does not per se constitute a violation of the right to be tried by a competent organ. What poses a problem is the fact that, very often, the military tribunals are an extension of the executive, rather than the judiciary. Military tribunals are not intended to try civilians. They are established to try military personnel under laws and regulations which govern the military. In communication 218/98 *Civil Liberties Organisation and Others v Nigeria* [(2001) AHRLR 75 (ACHPR 2001)] the Commission stated the following: 'The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.'[14]

128. The accused persons were not military personnel. The offences alleged to have been committed were quite capable of being tried by normal courts, within the jurisdictional areas the offences were allegedly committed. The Commission finds that trying civilians by the Yaoundé and the Bafoussam Military Tribunals was a violation of article 7(1)(b) of the Charter.

129. The complaints submit that the accused were tried in a language they did not understand, without the help of interpreters. The respondent state did not contradict that allegation. The Commission states that it is a prerequisite of the right to a fair trial, for a person to be tried in a language he understands, otherwise the right to defence is clearly hampered. A person put in such a situation cannot adequately prepare his defence, since he would not understand what he is being accused of, nor would he apprehend the legal arguments mounted against him.[15] The aforementioned Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, states that one of the essential elements of a fair hearing is: 'an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body.'[16]

130. The Commission recognises that the respondent state is a bilingual country. Its institutions including the judiciary can use either French or English. However since not all the citizens are fluent in both languages, it is the state's duty to make sure that, when a trial is conducted in a language that the accused does not speak, he/she is provided with the assistance of an interpreter. Failing to do that amounts to a violation of the right to a fair trial.

131. The Commission therefore concludes that the respondent state violated articles 7(1)(b), (c) and (d) of the Charter.

14 Para 27.
15 *Malawi African Association and Others v Mauritania* para 97.
16 Para 2(g).

Alleged violation of article 9

132. The communication alleges violation of article 9 of the Charter. The complainants did not make any submissions concerning article 9. The Commission has therefore not made any finding regarding article 9.

Alleged violation of article 10

133. The Complainants allege that the respondent state violated article 10 of the African Charter. The parties did not make any submission on article 10 of the Charter. The Commission finds no violation of article 10.

Alleged violation of article 11

134. The Commission examined whether article 11 was violated. The Commission deems that there is enough information on the record, based on the both parties to enable the Commission to make its determination.

135. Article 11 states that:

> Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety of others, health, ethics and rights and freedoms of others.

136. The facts before the Commission depict cases of suppression of demonstrations, including the use of force against, the arrest and detention of people taking part in such demonstrations. The Commission has held previously that 'the Charter must be interpreted holistically and all clauses must reinforce each other.'[17]

137. The Complainant states that several victims were arrested and held in detention for long periods, for exercising their right to freedom of assembly. Some of the detained persons were acquitted. There were others who died at the hands of security forces or in detention, after being accused of participation in 'unlawful political rallies'. The victims who died, or had been detained suffered while exercising their exercise of the right to freedom of assembly.

138. The Commission does not condone unlawful acts by individuals or organisations to advance political objectives, because such actions or their consequences are likely to violate the African Charter. It encourages individuals and organisations, when exercising their right to freedom of assembly, to operate within the national legal framework. This requirement does not absolve states parties from their duty to guarantee the rights to freedom of assembly, while maintaining law and order. The respondent states admits that it detained demonstrators, applied excessive force to enforce law and

[17] *Legal Resources Foundation v Zambia* para 70.

order, and in some cases lives were lost. The Commission concludes therefore that article 11 of the African Charter was violated.

Alleged violation of article 12

139. The complainants alleged that article 12 was violated by the respondent state. They did not substantiate any infringement by the respondent state of the right to freedom of movement. The Commission finds no violation of article 12.

Alleged violation of article 13

140. The complainants alleged violation of article 13. They stated that the people of Southern Cameroon were not adequately represented in the institutions of the Republic of Cameroon except for 'token' appointments. They allege further that the respondent state manipulated demographic data to deny Southern Cameroonians equal representation in government.

141. The respondent state submitted that, upon the introduction of multi-partyism in 1992, many Southern Cameroonian opposition parties, such as the Social Democratic Front (SDF), have participated in municipal, legislative and presidential elections. Opposition parties control several councils and are represented in the National Assembly. It argues that access to high office is open to all citizens without distinction. The respondent state accused the complainants of bad faith, and stated that some of the highest positions in the Republic had been held by Southern Cameroonians. It accuses SCNC and SCAPO of persecuting fellow Anglophones who refuse to adhere to the secession agenda.

142. The complainants claim that Southern Cameroonians have since 1961 been accorded only 20 % representation in the Federal/ National Assembly instead of the 22% they think they deserve. The complainants' main complaint is the ratio of representation, rather than non-representation. The respondent state states that 20% representation cannot be said to be 'tokenism'.

143. The Commission is inclined to agree with the respondent state. It finds that in spite of the alleged disproportionate percentage, Southern Cameroonians were represented, and hence participated in public affairs of the respondent state as required under article 13 of the African Charter.

144. The Commission states that it is not sufficient for the complainants to assert in general terms that a certain category of citizens were denied the right to access public positions or that they were under-represented in government or public administration. The Complainants did not furnish the Commission with information or cases that individuals in Southern Cameroon were denied representation or denied access to public services. The Commission

finds that allegations concerning 'tokenism' have not been substantiated and concludes that there is no violation of article 13.

Alleged violation of article 17

145. The complainants allege that the respondent state violated article 17 of the Charter, because it is destroying education in the Southern Cameroons by underfunding and understaffing primary education. That it imposed inappropriate reform of secondary and technical education. It discriminates Southern Cameroonians in the admission into the *Polytechnique* in Yaoundé, and refused to grant authorisation for registration of the Bamenda University of Science and Technology, thereby violating article 17 on the right to education.

146. The respondent state denied that it is destroying the education system in the Southern Cameroon. It provided detailed data and statistics on the measures it had taken to cater for the education sector in the Southern Cameroons. It stated that in certain cases it had provided more resources to Southern Cameroon than it had done for other regions. The complainants contested the reliability of the data and statistics, but did not convince the Commission that the data should not be relied upon.

147. Regarding the alleged discrimination concerning admission of Southern Cameroonians into the *Polytechnique* in Yaounde, the respondent state argued that admission to the National Advanced School of Engineering is based on merit, as is the case with all higher institutions of learning. It stated that the school has trained a number of civil engineers from both the Anglophone and Francophone parts.

148. Concerning the alleged refusal to grant authorisation for the registration of the Bamenda University of Science and Technology, the respondent state stated that the said university did not fulfill conditions for establishment of private universities. The complainant did not show whether the criteria were met by the Bamenda University of Science and Technology or not. The Commission reiterates that for it to make finding on any allegations, the Parties have to provide it with the necessary information. Rule 119 of the 1995 Rules of Procedure of the Commission (which govern this communication) require parties to furnish explanation or statements, including additional information.

149. The complainants should have done so under rule 119(3) of the Rules of Procedure. The Commission allowed parties to make oral submission in this particular case. The complainants did not substantiate the allegations. For the above reasons, the African Commissions finds that there is no violation of article 17(1) of the Charter.

150. The Commission then examined the alleged violation of articles 19, 20, 21, 22, 23(1) and 24 of the African Charter.

Alleged violation of article 19

151. The complainants premised the complaint alleging violation of their collective rights on the events which happened prior to 18 December 1989. The Commission has already expressed itself on the question of its jurisdiction *rationae temporis*. The complainants alleged that the respondent state 'forcefully and unlawfully annexed' Southern Cameroon. They argue that the respondent state:

> established its colonial rule there, complete with its structures, and its administrative, military and police personnel, applying a system and operating in a language alien to the Southern Cameroon, ... and continues to exercise a colonial sovereignty over Southern Cameroon to this day.

152. They argue further that:

> The occupation and assumption of a colonial sovereignty over Southern Cameroon by the respondent state amounts to violation of articles 19 and 20 of the African Charter ..., both of which outlaw domination, and colonialism in all its forms and manifestations. Article 19 places an absolute ban on the domination of one people by another. Article 20 emphatically asserts the right of every people to existence, to self determination, and of resistance to colonialism or oppression by resorting to any internationally recognised means of resistance.

153. These are very serious allegations which go to the root of the statehood and sovereignty of the Republic of Cameroon. The respondent state responded by arguing that the Commission is 'incompetent to handle the issue of the process of decolonisation that took place in this state and under the auspices of the United Nations.'

154. Respondent state submits further that the Commission cannot examine or adjudicate on the 1961 UN plebiscite, on events which took place between the October 1961 and 1972, when the Federal and Union constitutions were adopted, because they predated the entry into force of the Charter.

155. The Commission concedes that it is not competent to adjudicate on the legality of those events, due to limitation imposed on its jurisdiction *rationae temporis*, for reasons stated hereinabove. The Commission cannot make a finding on allegations made by the complainants concerning 'illegal and forced annexation, or colonial occupation of Southern Cameroon by the respondent state', since they fall outside its jurisdiction *rationae temporis*.

156. The Commission states, however that, if the Complainants can establish that any violation committed before 18 December 1989, continued thereafter, then the Commission shall have competence to examine it.

157. The Complainants alleged cases of economic marginalisation, and denial of basic infrastructure by the respondent state, as constituting violations of article 19. They allege that these violations

were a consequence of the events of 1961 and 1972, and continued after 18 December 1989.

158. The respondent state contested the allegation of economic marginalisation. It submitted documents and statistics in support of its provision of basic infrastructure in Southern Cameroon. The statistical information and data show that, for the period 1998 up to 2003/4, the North West and South West provinces, (Southern Cameroon) were allocated substantially higher budgetary resources, than the Francophone provinces, for the construction and maintenance of roads, and running of education training institutions. The documents show that the situation in the Anglophone regions is not that different from other parts of the country. It argued that the problem concerning inadequate infrastructural development is not peculiar to Southern Cameroon.

159. The complainants rejected as adulterated the data and statistics provided by the respondent. The complainants did not furnish any document to support their allegation. The Commission finds no reason why it should not rely on the data and statistics provided by the respondent state in its decision. The Commission holds that the respondent state allocated public resources to the Anglophone provinces without discrimination.

160. The respondent state did not however respond specifically to the allegations concerning the relocation of major economic projects and enterprises from Southern Cameroon. It explained the reason for relocating the seaport to Douala from Limbe, otherwise known as Victoria. It argues that, Douala being the gateway into Cameroon, the government needed to monitor the movement of persons and good for evident security reasons and efficient customs control.

161. Every State has an obligation under international law to preserve the integrity of its entire territory. The maintenance of security and movements of persons and goods on the territory is part of that obligation. The argument by the respondent state that it could not guarantee the security of persons and goods at Limbe, unless it moved the port, is tantamount to acknowledging that it had no control of Limbe. The Commission believes that the security and customs authorities could have effectively monitored the movement of persons and goods, even if the seaport had continued to be at Limbe.

162. The Commission states that the relocation of business enterprises and location of economic projects to Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon constituted violation of article 19 of the Charter.

Alleged violation of article 20

163. The complainants state that the 'alleged unlawful and forced annexation and colonial occupation' of Southern Cameroon by the respondent state constituted a violation of article 20 of the Charter. They claim that Southern Cameroonians are entitled to exercise the rights to self-determination under article 20 of the Charter as a separate and distinct people from the people of *La Republique du Cameroon*. Article 20 stipulates that:

> (1) All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
>
> (2) Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
>
> (3) All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.

164. The complainants submit that the UN plebiscite was premised on certain conditions, including the convening of a conference of equal representative delegations from the Republic of Cameroon and Southern Cameroon to work out the conditions for the transfer of sovereign powers to the future federation. It is further submitted that such arrangements should have been approved by the separate parliaments of the Republic of Cameroon and Southern Cameroon before sovereignty was transferred to a single entity representing both sides. The complainants submit that the results of the plebiscite were never submitted to the parliament of the Southern Cameroon for approval.

165. The respondent state did not respond to the allegations concerning 'unlawful annexation and colonialism'. It submitted instead that the issues are incapable of adjudication by the Commission on account of its lack of jurisdiction.

166. The respondent state contested further the claim that Southern Cameroonians are a 'separate and distinct people'. The Commission shall examine this issue.

167. The complainants reiterate that their 'separate and distinct' identity is based on the British administration over Southern Cameroon. They submit that they speak the English language, and apply the common law legal tradition, as opposed to the Francophone zone, where French is spoken and the civil law system is applicable.

168. The respondent state submitted that it does not dispute the basic historical facts concerning the trust administration, but denies that Southern Cameroonians exist as a 'people'. It states the following;

> The complainants raise in order to shore up this assertion the use of the English language (working language), the specificity of the legal system,

> of the educational system, of the system of government, traditional cultures. In fact, the specificities of former Southern Cameroons stem solely from the heritage of British administration and the legacy of Anglo-Saxon culture. No ethno-anthropological argument can be put forward to determine the existence of a people of Southern Cameroons, the Southern part being of the large Sawa cultural area, the northern part being part of the Grass fields' cultural area. Since 1961, although some specificities had been preserved on more than one aspect, there had been remarkable rapprochement at the administrative and legal levels. The 'separate and distinct people' thesis is no longer valid today.

169. The Commission shall clarify its understanding of 'peoples' rights' under the African Charter. The Commission is aware the controversial nature of the issue, due to the political connotation that it carries. That controversy is as old as the Charter. The drafters of the Charter refrained deliberately from defining it.[18] To date, the concept has not been defined under international law. However, there is recognition that certain objective features attributable to a collective of individuals, may warrant them to be considered as 'people'.

170. A group of international law experts commissioned by UNESCO to reflect on the concept of 'people' concluded that where a group of people manifest some of the following characteristics; a common historical tradition, a racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life, it may be considered to be a 'people'. Such a group may also identify itself as a people, by virtue of their consciousness that they are a people.[19] This characterisation does not bind the Commission but can only be used as a guide.

171. In the context of the African Charter, the notion of 'people' is closely related to collective rights. Collective rights enumerated under articles 19 to 24 of the Charter can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.

172. The drafters of the Charter provided for the protection of 'peoples rights' under the Charter. In his book, entitled The Law of the African (Banjul) Charter on Human and Peoples' Rights, Justice Hassan B. Jallow,[20] an eminent African jurist, who participated in the drafting the African Charter, sheds light on this issue. He says that:

> The concept of peoples' rights, to which a whole chapter had been devoted in the draft did not mean there was any grading of rights. There were economic, social and cultural rights which have particular

[18] See the report of the rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, the Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II), p 4.

[19] See the final report and recommendations of the Meeting of Experts on extending of the debate on the concept of 'peoples' rights' held in Paris, France, from 27 to 30 November 1989, SHS-/CONF.602/COL.1, para 22.

[20] Trafford Publishing, Canada 2007.

> importance to developing countries and which together with civil rights and political rights in one complementary whole should henceforth be given an important place.[21]

173. Justice Jallow cites the late President Leopold Sedar Senghor, the first President of Senegal and an eminent African statesman, who told the inaugural meeting of African Legal Experts to draft the Charter, the following:

> People will perhaps expatiate for a long time upon the 'people rights' we were very keen on referring to. We simply meant, by so doing, to show our attachment to economic, social, and cultural rights, to collective rights in general, rights which have a particular importance in our situation of a developing country. We are certainly not drawing lines of demarcation between the different categories of rights. We want to show essentially that beside civil and political rights, economic, social and cultural rights should henceforth be given the important place they deserve. We wanted to lay emphasis on the right to development and the other rights which need the solidarity of our States to be fully met; the right to peace and security, the right to a healthy environment, right to participate in the equitable share of the common heritage of mankind, the right to enjoy a fair international economic order and, finally the right to natural wealth and resources.[22]

174. The African Commission has itself dealt with the issues of peoples' rights without defining the term 'people' or 'peoples' rights'. In its acclaimed Report of the Working Group of Experts on Indigenous Populations/Communities,[23] the African Commission described its dilemma of defining the concepts in the following terms:

> Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESR do not define 'peoples'. It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding article 17 make reference to 'every individual'. Article 18 serves as a break by referring to the family. Articles 19-24 make specific reference to 'all peoples.'

175. It continues:

> Given such specificity, it is surprising that the African Charter fails to define 'peoples' unless it was trusted that its meaning could be discerned from the prevailing international instruments and norms. Two conclusions can be drawn from this. One, that the African Charter seeks to make provision for group or collective rights, that is, that set of rights that can conceivably be enjoyed only in a collective manner like the right to self determination or independence or sovereignty ...[24]

176. The Commission deduces from the foregoing discourse that peoples' rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said

21 Jallow, above, page 28.

22 As above, page 29.

23 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

24 As above, at page 72-73, Part 3.4 Jurisprudence from the African Commission on Human and Peoples' Rights, under chapter 3; An analysis of the African Charter and its jurisprudence on the concept of 'peoples'.

of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity, ie common rights which benefit the community such as the right to development, peace, security, a healthy environment, self determination and the right to equitable share of their resources.

177. It is in the light of the above that the Commission shall examine the allegations against the respondent state, concerning the violations of the collective rights cited hereinabove.

178. The Commission states that after thorough analysis of the arguments and literature, it finds that the people of Southern Cameroon can legitimately claim to be a 'people'. Besides the individual rights due to Southern Cameroon[ians], they have a distinct identity which attracts certain collective rights. The UNESCO Group of Experts report referred to hereinabove, states that for a collective of individuals to constitute a 'people' they need to manifest some, or all the identified attributes. The Commission agrees with the respondent state that a 'people' may manifest ethno-anthropological attributes. Ethno-anthropological attributes may be added to the characteristics of a 'people'. Such attributes are necessary only when determining indigenology of a 'people', but cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights. Was it the intention of the state parties to rely on ethno-anthropological roots only to determine 'peoples' rights', they would have said so in the African Charter? As it is, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno-anthropological roots are not African.

179. Based on that reasoning, the Commission finds that 'the people of Southern Cameroon' qualify to be referred to as a 'people' because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it.

180. The respondent state might not recognise such innate characteristics. That shall not resolve the question of self identification of Southern Cameroonians. It might actually postpone the solution to the problems in Southern Cameroon, including those already highlighted hereinabove. The respondent state acknowledges that there have been problems created regularly by the secessionist SCNC and SCAPO, in that part of its territory, which calls itself the 'Southern Cameroon'.

181. The Commission is aware that post colonial Africa has witnessed numerous cases of domination of one group of people over others, either on the basis of race, religion, or ethnicity, without such domination constituting colonialism in the classical sense. Civil wars and internal conflicts on the continent are testimony to that fact. It is incumbent on state parties, therefore, whenever faced with allegations of the nature contained in the present communication, to address them rather than ignore them under the guise of sovereignty and territorial integrity. Mechanisms such as the African Commission were established to resolve disputes in an amicable and peaceful manner. If such mechanisms are utilised in good faith, they can spare the continent valuable human and material resources, otherwise lost due to conflicts fighting against ethnic, religious domination or economic marginalisation.

182. The Commission shall address the question, whether the people of Southern Cameroon are entitled to the right to self-determination. In so doing it shall contextualise the question by dealing, not with the 1961 UN plebsicite, or the 1972 unification, but rather the events of 1993 and 1994 on the constitutional demands *vis-à-vis* the claim for the right to self-determination of the Southern Cameroonian people.

183. The complainants allege that the 1993 Buea and 1994 Bamenda Anglophone conferences submitted constitutional proposals, which were ignored by the respondent state. This forced the complainants to conduct a signature referendum of Southern Cameroonians in 1995, which endorsed separation.

184. The complainants argued that the people of Southern Cameroon through the 1993, 1994 conferences, and the 1995 signature referendum, raised issues of constitutional, political and economic marginalisation. They allege further that the Constitution adopted by the respondent state in December 1995 did not address their appeals for autonomy. The Commission is of the view that these complaints merit its determination.

185. The Complainants submit that the respondent state's refusal or failure to address their grievances amounted to a violation of article 20. They claim therefore that they are entitled to exercise their right to self-determination under the Charter. The respondent state responds that these grievances constitute a secessionist agenda by SCNC and SCAPO. It denies that the Complainants are entitled to exercise the right to self-determination under article 20.

186. The respondent state submitted that the Buea Declaration of 3 April 1993 recognised that the Southern Cameroonians had freely joined *La Republique du Cameroun* in 1961, and further that the transition to a unitary state in 1972 was approved by both Francophones and Anglophones who voted 98.26% and 97.9%

respectively through a national referendum. It states further that the so called referendum of September 1995 by SCNC does not invalidate the 1972 data. The respondent state doubts the accuracy of the referendum. It states that:

> [s]ince 1996, the State of Cameroon is a unitary decentralised State, adopted by members of parliament, including those from the Anglophone part of the country. Legal instruments relating to putting in place of the decentralised regional and local authorities ... were enacted in July 2004.

187. The respondent state argues further that

> [t]he self determination of the 'people' of Southern Cameroon, following the logic of the Commission (cf per the Katanga case) would be understandable where there are tangible evidence of massive violations of human rights, and where there is evidence ascertaining the refusal of the nationals of Southern Cameroon, the right to take part in the management of public affairs of the State of Cameroon. There is no such proof ...

188. The Commission recalls that the Katangese had urged the Commission to recognise the independence of Katanga. In reaching its decision in that case, the Commission stated the following:

> The claim is brought under article 20(1) of the African Charter ... There are no allegations of specific breaches of other human rights apart from the claim of the denial of self determination. All peoples have a right to self determination. There may however be controversy as to the definition of peoples and the content of the right. The issue in this case is not self determination for all Zairoise as a people but specifically the Katangese. Whether the Katangese consist of one or more ethnic groups is, for this purpose immaterial and no evidence has been adduced to that effect. The Commission believes that self determination may be exercised in any of the following ways: independence, self-government, local government, federalism, confederalism, unitarism or any form of relations that accords with the wishes of the people but fully cognisant of other recognised principles such as sovereignty and territorial integrity.[25]

189. The respondent state condemns the complainants' secessionist agenda. This Commission stated in the *Katanga* case that, it 'is obliged to uphold the sovereignty and territorial integrity of Zaire, a member of the OAU and a party to the African Charter of Human and Peoples' Rights.'

190. The Commission notes that the Republic of Cameroon is a party to the Constitutive Act (and was a state party to the OAU Charter). It is a party to the African Charter on Human and Peoples' Rights as well. The Commission is obliged to uphold the territorial integrity of the respondent state. As a consequence, the Commission cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons. That will jeopardise the territorial integrity of the Republic of Cameroon.

191. The Commission states that secession is not the sole avenue open to Southern Cameroonians to exercise the right to self

[25] Communication 75/92 [*Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995)] para 4.

determination.[26] The African Charter cannot be invoked by a Complainant to threaten the sovereignty and territorial integrity of a State party. The Commission has however accepted that autonomy within a sovereign state, in the context of self government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter. In their submission, the Respondent State implicitly accepted that self determination may be exercisable by the Complainants on condition that they establish cases of massive violations of human rights, or denial of participation in public affairs.

192. The complainants have submitted that the people of the Southern Cameroon are marginalised, oppressed, and discriminated against to such an extent that they demand to exert their right to self-determination.

193. The respondent state submitted that the 1996 Constitution was adopted by the National Assembly, which included representatives of the people of Southern Cameroon. The respondent state argues that, within the framework of the 1996 Constitution, three laws on decentralisation, which 'will enable Cameroon to resume the development of local potentials', were adopted by the Parliament. The respondent state submits further that since 2004 measures are being taken to give more autonomy to regions. Whether the laws shall be applied to address the concerns of South Cameroonians, will depend on the goodwill of both sides.

194. The Commission has so far found that the respondent has violated articles 2, 4, 5, 6, 7, 11 and 19 of the Charter. It is the view of the Commission, however that, in order for such violations to constitute the basis for the exercise of the right to self determination under the African Charter, they must meet the test set out in the Katanga case, that is, there must be

> concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by article 13(1).

195. The Commission has already made a finding that article 13 was not violated. The Commission saw ample evidence that the people of Southern Cameroon are represented in the National Assembly, at least through an opposition party, the SDF. Information on the record suggests that there has been some form of representation of the people of Southern Cameroon in the national institutions prior to, and after 18 December 1989. The complainants may not recognise the representatives elected to the national institutions under the current constitutional arrangement. The respondent state on the other hand may not share the same views or even recognise the SCNC and SCAPO as representing a section of the people of Southern Cameroon.

[26] See above para 185.

196. The complainants' main complaint is that the people of Southern Cameroon are denied equal status in the determination of national issues. They allege that their constitutional demands have been ignored by the respondent state. In other words they assert their right to exist and hence the right to determine their own political, social and economic affairs under article 20(1).

197. The Commission is not convinced that the respondent state violated article 20 of the Charter. The Commission holds the view that when a Complainant seeks to invoke article 20 of the African Charter, it must satisfy the Commission that the two conditions under article 20(2) namely oppression and domination have been met.

198. The complainants have not demonstrated if these conditions have been met to warrant invoking the right to self determination. The basic demands of the SCNC and SCAPO as well as the two Anglophone conferences, is the holding of constitutional negotiations to address economic marginalisation, unequal representation and access to economic benefits. Secession was the last option after the demands of Buea and Bamenda conferences were ignored by the respondent state.

199. Going by the *Katanga* decision, the right to self determination cannot be exercised, in the absence of proof of massive violation of human rights under the Charter. The respondent state holds the same view. The Commission states that the various forms of governance or self determination such as federalism, local government, unitarism, confederacy, and self government can be exercised only subject to conformity with state sovereignty and territorial integrity of a state party. It must take into account the popular will of the entire population, exercised through democratic means, such as by way of a referendum, or other means of creating national consensus. Such forms of governance cannot be imposed on a state party or a people by the African Commission.

200. The African Commission finds that the people of Southern Cameroon cannot engage in secession, except within the terms expressed hereinabove, since secession is not recognised as a variant of the right to self determination within the context of the African Charter.

201. The Commission, however, finds also that the respondent state violated various rights protected by the African Charter in respect of Southern Cameroonians. It urges the respondent state to address the grievances expressed by the Southern Cameroonians through its democratic institutions. The 1993 Buea and 1994 Bamenda Anglophone conferences raised constitutional and human rights issues which have been a matter of concern to a sizable section of the Southern Cameroonian population for quite a long time. The demand for these rights has lead to civil unrest, demonstrations, arrests,

detention, and the deaths of various people, which culminated in the demand for secession.

202. The respondent state implicitly acknowledges the existence of this unwelcome state of affairs. It is evident that the 1995 Constitution did not address the Southern Cameroonians' demands, particularly since it did not accommodate the concerns expressed through the 1993 Buea Declaration and 1994 Bamenda Proclamation.

203. The Commission believes that the Southern Cameroonians' grievances cannot be resolved through secession but through a comprehensive national dialogue.

Alleged violation of article 21

204. The Complainants allege violation of article 21. They did not bring any evidence to support their allegation. In the absence of any such evidence, the Commission finds no violation against the respondent state.

Alleged violation of article 22

205. The complainants alleged cases of economic marginalisation and lack of economic infrastructure. The lack of such resources, if proven would constitute violation of the right to development under article 22.

206. The Commission is cognisant of the fact that the realisation of the right to development is a big challenge to the respondent state, as it is for state parties to the Charter, which are developing countries with scarce resources. The respondent state gave explanations and statistical data showing its allocation of development resources in various socio-economic sectors. The respondent state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights. This may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances. This alone cannot be a basis for the finding of a violation. The Commission does not a find a violation of article 22.

Alleged violation of article 23(1)

207. The complainants did not substantiate their allegations on the violation under article 23(1). The Commission therefore finds that there was no violation of article 23(1) of the Charter.

Alleged violation of article 24

208. No evidence was brought to support the allegation that article 24 has been violated. Consequently, the Commission finds no violation.

Alleged violation of article 26

209. The complainants alleged violation of article 26. They submitted that the judiciary in the respondent state is not independent. They allege that the executive branch influences the judiciary through the appointments, promotions or transfer policy. It is also alleged that the President of the Republic convenes and presides over the Higher Judicial Council.

210. The respondent state avers that judicial independence is guaranteed by the Constitution. It states that article 37 of the 1972 Constitution requires every institution and person, including the President to respect it. The state argues further that the Higher Judicial Council which is the appointing and disciplinary authority for magistrates does not necessarily require magistrates to pledge allegiance to the President. It concedes that the President of the Republic chairs the Higher Judicial Council, the Minister for Justice, is the Vice Chairperson, three members of Parliament, three members of the bench, and an independent personality.

211. The Commission states that the doctrine of separation of powers requires the three pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise in order to guarantee its independence, the judiciary, must be seen to be independent from the executive and parliament. The admission by the Respondent State that the President of the Republic, and the Minister responsible for Justice are the Chairperson and Vice Chairperson of the Higher Judicial Council respectively is manifest proof that the judiciary is not independent.

212. The composition of the Higher Judicial Council by other members is not likely to provide the necessary 'checks and balance' against the Chairperson, who happens to be the President of the Republic. The allegations by the Complainants in this regard are therefore substantiated. The Commission does not hesitate to find the respondent state in violation of article 26.

213. The complainants did not mention article 1 among the provisions of the African Charter alleged to have been violated by the respondent state. However, according to its well established jurisprudence, the African Commission holds that a violation of any other provision of the African Charter automatically constitutes a violation of article 1 as it depicts a failure of the state party concerned to adopt adequate measures to give effect to the provisions of the African Charter. Thus, having found violations of several provisions in the above analysis, the African Commission also finds that the respondent state violated article 1.

214. For the above reasons, the African Commission:

- Finds that articles 12, 13, 17(1), 20, 21, 22, 23(1) and 24 have not been violated.
- Finds that the Republic of Cameroon has violated articles 1, 2, 4, 5, 6, 7(1), 10, 11, 19 and 26 of the Charter.

Recommendations

215. The African Commission therefore recommends as follows;

1. That the respondent state:

(1) Abolishes all discriminatory practices against people of Northwest and Southwest Cameroon, including equal usage of the English language in business transactions;

(2) Stops the transfer of accused persons from the Anglophone provinces for trial in the Francophone provinces;

(3) Ensures that every person facing criminal charges be tried under the language he/she understands. In the alternative, the respondent state must ensure that interpreters are employed in courts to avoid jeopardising the rights of accused persons;

(4) Locates national projects, equitably throughout the country, including Northwest and Southwest Cameroon, in accordance with economic viability as well as regional balance;

(5) Pays compensation to companies in Northwest and Southwest Cameroon, which suffered as a result of discriminatory treatment by banks;

(6) Enters into constructive dialogue with the complainants, and in particular, SCNC and SCAPO to resolve the constitutional issues, as well as grievances which could threaten national unity; and

(7) Reforms the Higher Judicial Council, by ensuring that it is composed of personalities other than the President of the Republic, the Minister for Justice and other members of the Executive Branch.

2. To the complainants, and SCNC and SCAPO in particular,

(1) To transform into political parties,

(2) To abandon secessionism and engage in constructive dialogue with the respondent state on the constitutional issues and grievances.

3. The African Commission places its good offices at the disposal of the parties to mediate an amicable solution and to ensure the effective implementation of the above recommendations.

4. The African Commission requests the parties to report on the implementation of the aforesaid recommendations within 180 days of the adoption of this decision by the AU Assembly.

Association of Victims of Post Electoral Violence and Another v Cameroon

(2009) AHRLR 47 (ACHPR 2009)

Communication 272/2003, *Association of Victims of Post Electoral Violence and Interights v Cameroon*

Decided at the 46th ordinary session, November 2009, 27th Activity Report

Responsibility for post electoral violence

Admissibility (exhaustion of local remedies, unduly prolonged, 63-67)
State responsibility (duty to give effect to rights in the Charter, 87-91; effective measures to prevent violations by non-state actors, due diligence, 110, 112, 115-121, 137)
Fair trial (trial within reasonable time, 130)

1. The communication had been initiated against the Republic of Cameroon, state party[1] to the African Charter, by two non-governmental organisations (NGOs): The Association of the Victims of Post Electoral Violence of 1992 of the North West Region, headquartered in Bamenda, Cameroon; and the International Centre for the Legal Protection of Human Rights (Interights),[2] headquartered in London, UK.

2. In the communication, the complainants contend that on 23 October 1992, in reaction to the confirmation by the Supreme Court of Cameroon of the victory of the candidate Paul Biya of the Cameroon Peoples' Democratic Party (RDPC) in the presidential elections of 11 October 1992, the members of the Social Democratic Front (SDF), the principal opposition party, attacked the symbols of the state and the militants of the party which won the elections, in the city of Bamenda, their party stronghold.

3. Property belonging to RDPC militants and to other citizens is said to have been destroyed. The damages caused to Messrs Albert Cho Ngafor and Joseph Ncho Adu are estimated at one billion CFA francs for each of them. Damages to the tune of 800 million CFA francs are said to have been caused to about a hundred other individuals.

1 Cameroon ratified the Charter on 26 June 1989.
2 INTERIGHTS enjoys observer status with the African Commission.

4. Certain victims such as Mr Albert Cho Ngafor, who had been sprayed with petrol, were moreover subjected to serious physical attacks.

5. In consequence the Cameroonian authorities arrested certain individuals presumed to be responsible for these events; the said authorities also set up, in February 1993, a committee responsible for the compensation of the victims.

6. However, having waited in vain for their compensation, the victims of the post electoral violence of Bamenda organised themselves into an association and embarked on certain activities in order to have the matter settled amicably.

7. This method however proved fruitless, as, in spite of firm promises made by the president of the Republic, who had been approached in the context of the measures taken towards an amicable settlement, no concrete result had been obtained by the victims of the violence.

8. On 13 March 1998, the victims of the Bamenda events brought an appeal for responsibility against the Cameroonian state to the Administrative Chamber of the Supreme Court. The appeal in question had been recorded on the 22 April 1998 by the Clerk of Courts, under the number 835/97-98.

9. On 16 July 1998, the government of Cameroon reacted, requesting the Supreme Court to declare the victims' submission inadmissible and since then, the proceedings have been blocked in spite of all the efforts made by the counsels of the complainants, with the support of certain administrative authorities, like the Commissioner of the District of Mezam (home region of the victims).

The complaint

10. The complainants allege the violation of articles 1, 2, 4, 7 and 14 of the African Charter by the Republic of Cameroon. In consequence, the complainants are requesting the African Commission to:

- Declare the refusal by the Administrative Chamber of the Supreme Court of Cameroon to consider their appeal against the government of Cameroon as contrary to the principles of the right to a fair hearing, as stipulated by the African Charter in its article 7 and by the relevant provisions of other international human rights instruments;
- Note that the government of Cameroon has not respected its obligation to protect the physical integrity (article 4) and property (article 14) of individuals living on its territory or under its jurisdiction;
- Request the government of Cameroon to pay full compensation for the damages suffered by the victims of the post electoral violence in Bamenda;
- Request the government of Cameroon to enact positive legislation to ensure the fair, equitable and rapid compensation for the

victims of human rights violations and to ascertain that the human rights violations committed in Bamenda do not happen again in Cameroon.

The procedure

11. The communication which was received at the Secretariat of the African Commission on 4 April 2003 had been registered under 272/2003, for consideration by the African Commission at its 33rd ordinary session (15-29 May, in Niamey, Niger).

12. By letter ACHPR/COMM/2 of 15 April 2003, the Secretariat of the African Commission acknowledged receipt of the communication to the complainants.

13. During its 33rd ordinary session, the African Commission examined the complaint and decided to be seized of it. Consideration of its admissibility was deferred to its 34th ordinary session scheduled to be held from 7 to 21 October 2003 in Banjul, The Gambia.

14. By letter and by *note verbale* of 27 June 2003, the Secretariat of the African Commission informed both the complainants and the respondent state of the decision of the African Commission.

15. On 5 August 2003, the Secretariat received a memorandum from the complainants on the admissibility of the complaint and conveyed it to the respondent state by *note verbale* dated 6 August 2003, whilst reminding it to convey its own memorandum to the Secretariat as early as possible.

16. By *note verbale* of 14 October 2003, the Ministry of Foreign Affairs of the Republic of Cameroon requested additional information and more time for it to prepare its memorandum on the admissibility of the case.

17. By letter of 17 October 2003, the Secretariat contacted the complainants requesting them to provide the supplementary information required by the respondent state. The complainants complied without delay and the request of the respondent state was met on 30 October 2003.

18. During its 34th ordinary session which was held from 6 to 20 November 2003 in Banjul, The Gambia, the African Commission examined the complaint and heard the parties. Sequel to this, the African Commission deferred its decision on admissibility of the case to its 35th ordinary session.

19. By *note verbale* and by letter of 16 and 17 December 2003 respectively, the Secretariat of the African Commission informed the parties reminding the respondent state that its memorandum on admissibility was still outstanding.

20. By letter dated 16 March 2004, and received at the Secretariat of the Commission on 18 March 2004, the complainants conveyed a

letter transmitting additional arguments in response to the oral arguments made by respondent state at the 34th ordinary session held in Banjul, The Gambia from 6 to 20 November 2003.

21. On 19 March 2004, the Secretariat of the African Commission sent a *note verbale* to the respondent state reminding it to send its comments on the admissibility of the complaint.

22. By *note verbale* dated 6 April 2004 and received at the Secretariat of the African Commission, the respondent state, referring to the *note verbale* sent to it on 16 December 2003, informed the Secretariat that the case of which the African Commission had been seized and which opposed it to the complainants, was still pending before the Administrative Chamber of the Supreme Court of Cameroon which had deferred the said case to 26 May 2004.

23. During its 35th ordinary session which was held in May/June 2004 in Banjul, The Gambia, the African Commission examined the complaint and heard the parties on the admissibility of the case. On this occasion, the respondent state submitted in writing, its memorandum on the admissibility of the case to the Secretariat of the African Commission, which in turn had conveyed it to the complainant party by letter dated 17 November 2004.

24. During its 36th ordinary session, which was held in November/ December 2004 in Dakar, Senegal, the African Commission considered the complaint and declared it admissible.

25. By letters dated 20 December 2004, the Secretariat of the African Commission notified this decision to the parties and requested their arguments on the merits of the case as early as possible.

26. On 30 March 2005, the arguments of the respondent state on the merits of the communication had been received at the Secretariat of the African Commission through a *note verbale* dated 16 March 2005.

27. On 14 April 2005, the Secretariat of the Commission acknowledged receipt of the memorandum from the respondent state on the merits of the Communication and on that same date, conveyed it to the complainant party for reaction.

28. On 3 October 2005, the complainant sent its rejoinder to the observations of the respondent state on the merits of the complaint by letter dated 26 September 2005. On 13 October 2005, the Secretariat acknowledged receipt of the letter.

29. On 30 November 2005, this document had been forwarded against a receipt of acknowledgement, to the delegation of the respondent state attending the 38th ordinary session of the Commission.

30. During this same session (21 November - 5 December 2005, Banjul, The Gambia), the African Commission examined the complaint and in the absence of any reaction from the respondent state to the arguments of the complainant party on the merits of the case, deferred its decision at this point to its 39th ordinary session.

31. On 7 December 2005, this decision was notified to the parties and the respondent state, in particular had been invited to send its reaction on the submissions of the complainant within three months.

32. In the absence of any reaction from the respondent state, a reminder had been sent to it on the 23 March 2006.

33. By *note verbale* dated 29 March 2006, and received by the Secretariat of the African Commission on 13 April 2006, the respondent state conveyed its reaction on the arguments submitted by the complainant party on the merits of the case.

34. The Secretariat transmitted these arguments to the complainant party on 8 May 2006.

35. In a *note verbale* dated 30 June 2006 and a letter also dated 30 June 2006, the parties had been respectively informed that during its 39th ordinary session, the African Commission had decided to defer the case to its 40th ordinary session scheduled for 15 to 29 November 2006 in Banjul, The Gambia.

36. On 4 October 2006, the Secretariat of the Commission received a memorandum from the complainant party in rejoinder to the arguments on the merits formulated by the respondent state to the communication.

37. During its 40th ordinary session held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission decided to defer the case to its 41st ordinary session scheduled for the 16 to 30 May 2007 in Accra, Ghana for a ruling on the merits of the case.

38. In a *note verbale* dated 31 January 2007 and a letter also dated 31 January 2007, the parties were informed about the deferment of the case to the 41st ordinary session of the African Commission scheduled for the 16 to 30 May 2007 in Accra, Ghana.

39. During its 41st ordinary session held in Accra, Ghana, the African Commission had deferred the Communication to its 42nd ordinary session for a decision on the merits of the case.

40. By *note verbale* dated 15 June 2007 and a letter dated the same day, the parties to the communication had been informed of the deferment of the case to the 42nd ordinary session of the Commission scheduled for the 14 to 28 November 2007 in Brazzaville, Congo.

41. In a *note verbale* dated 11 September 2007 a letter had been sent to the respondent state reminding it of the deferment of the communication to the 42nd ordinary session.

42. By letter dated 13 September 2007, the complainant party had been reminded about the deferment of the Communication to the 42nd ordinary session.

43. The parties had been respectively informed in a *note verbale* and a letter dated 19 December 2007 about the deferment of the examination of the decision on the merits to the 43rd ordinary session of the Commission to be held from 15 to 29 May 2008 in Ezulwini, in the Kingdom of Swaziland.

44. In a *note verbale* dated 18 March 2008 and a letter dated 20 March 2008, the parties had been reminded of the deferment of the case to the 43rd ordinary session of the Commission. The parties had however been informed of the change of dates of the said session the holding of which had been brought forward to 7 to 22 May 2008 instead of from 15 to 29 May as had been initially announced.

45. In a *note verbale* dated 24 October 2008, the Secretariat informed the respondent state about the deferment of consideration on the decision on the merits of the communication to the 44th ordinary session scheduled for 10 to 24 November 2008 in Abuja, Nigeria.

46. During the same period of 24 October 2008, the complainants had been informed by letter of the deferment of the communication for examination on the merits to the 44th ordinary session of the African Commission.

47. After the examination of the communication at the 44th ordinary session held in Abuja in the Federal Republic of Nigeria, the African Commission deferred the reexamination to the 45th ordinary session scheduled for the 13 to 27 May 2009 in Banjul, the Gambia for the consideration of the new developments in the area of international law.

48. In a *note verbale* dated 21 December 2008 and a letter dated the same day, the Secretariat informed the parties to the communication about the deferment of the case to the 45th ordinary session scheduled for 13 to 27 May 2009. In addition by *note verbale* dated 23 April 2009 and a letter dated the same day, a reminder was sent to the parties.

49. The parties to the communication were informed that the matter was deferred to the 46th ordinary session of the Commission scheduled to be held in Banjul, The Gambia from 11 to 25 November 2009 in a *note verbale* and a letter both dated 11 June 2009.

Law

Admissibility

50. The African Charter on Human and Peoples' Rights stipulates in its article 56 that the communications referred to in article 55 should necessarily, in order to be considered, be sent after all local remedies have been exhausted, if they exist, unless the procedure of exhaustion of local remedies is unduly prolonged.

51. In this instance, the complainant, while admitting that the case is still under consideration by the legal authorities of the respondent state who had been seized of it, contends that the procedures are unduly prolonged and that under these conditions the requirement that local remedies be exhausted as stipulated by article 56 of the African Charter, cannot apply.

Arguments of the complainant party on the admissibility of the case

52. In support of his argument, the complainant contends, in his memorandum on admissibility dated 5 August 2003, that the complaint had been deposited with the African Commission five years after the same complaint against Cameroon had been brought before the administrative chamber of the Supreme Court of this state, and which has, to date, remained without any response.

53. In the memorandum cited earlier, the complainant further contends that the alleged victims of the complaint had made several fruitless submissions for an out-of-court settlement to the administrative and political authorities of the respondent state. The alleged victims had then brought an appeal for liability against the state of Cameroon before the administrative chamber of the Supreme Court on 13 March 1998. The latter conveyed its statement on defence to the complainants on 12 August 1998. Since that date and in spite of the reaction of the complainants (27 August 1998) and the numerous reminders, the complainants did not receive any more information relating to the case from the administrative chamber of the Supreme Court, and this despite the national[3] procedural legislation which stipulates that once the exchange of arguments is completed, the case files should be closed in the 5 months that follow. Five years have passed without any reaction from the administrative chamber of the Supreme Court.

54. It is for this reason, pleads the complainant, that although local remedies are available, they do not 'at all respond to the imperative of efficacy which is their *raison d'être*'. The complainant adds that the administrative chamber of the Supreme Court is familiar with this

[3] Cf Law 75/17 of the 08/12/1975 relative to the procedure before the Supreme Court.

type of practices, which is why Cameroon had been condemned by the African Commission[4] (for a case which had remained pending for 12 years before the Yaoundé Court of Appeal) as well as by the United Nations Human Rights [Committee][5] (for a case which had remained pending before the administrative chamber of the Supreme Court for more than four years).

55. During a hearing at the 34th ordinary session of the African Commission, the complainant party had reiterated these arguments insisting on the fact that the bringing of this case before the African Commission had contributed a lot to the revival of the case by the Cameroon legal authorities after all these years of inaction.

56. In its memorandum with supplementary information on admissibility, dated 18 March 2004, the complainant recalled that the respondent state had been condemned by the African Commission and by the United Nations Human Rights [Committee] for the slowness of its justice system. These delays, which cannot be attributed to Cameroon's underdevelopment, but rather, according to the complainant, 'to the inefficiency of the Cameroonian national authorities, both legal and administrative' are not only contrary to the African Charter but also to the principles of the right to a fair hearing adopted by the African Commission.

57. The complainant further reiterates that the violation, according to counsel, by the administrative chamber of the Supreme Court, of the regulations which stipulate that once the exchanges of memoranda are completed, the latter should close the case file within five months, as since August 1998, the complainants had not received any news from the said chamber in spite of several reminders and, according to the complainants, despite the fact that the judges of this court were 'perfectly aware of the implications of this procedure for the complainants'.

58. The complainant party moreover denounces the attitude of the powers that be, who had made promises which never culminated in results, but above all the shortcomings of the Cameroonian authorities exposed by the mal-functioning of the Commission responsible for compensating the victims of the violence (placed under the Prime Minister's Office), which had been created in the context of the effort to find an amicable solution to the problem. This Commission, declares the complainant, had been one of the local remedies open to the victims. But 12 years after its creation and 11 years after having heard the victims, this Commission had still not submitted its report. There again, concludes the complainant, the delay is unduly prolonged. The complainant therefore implores the African Commission to declare the complaint admissible.

4 Communication 59/91, *Embga Mekongo v Cameroon* [(2000) AHRLR 56 (ACHPR 1995)].

5 Communication 630/1995, *Mazou v Cameroon*.

Arguments of the respondent state on the admissibility of the case

59. The respondent state had for its part pleaded, during the hearing before the African Commission at its 34th ordinary session, that the delays observed in the administration of justice in Cameroon are due to the under developed nature of the country, which does not have the means to provide all the facilities required for a diligent justice system, and not to a deliberate desire by the government to hinder the administration of justice.

60. The respondent state again reiterated this point during a hearing by the African Commission at its 35th ordinary session. In its memorandum on admissibility submitted on this occasion, the respondent state pleads that the complaint is still under consideration before one of the highest national courts which, certainly has a lot of backlog in its work, but which is aware of the situation and that the parties require that the case be concluded by the national legal authorities. Thus, on 25 February and 31 March 2004, the administrative chamber of the Supreme Court held two ordinary sessions. The debate on the case in question, scheduled for the 31 March 2004 had been postponed to the 26 May 2004 on the request of the counsel for the complainants.

61. The respondent state further pointed out that for these reasons, the complainant should not speak of abnormally long delays in the Cameroonian justice system, particularly where the 'current delay is not attributable to the court in charge of the case but rather to the complainant party itself'.

62. In consequence, the respondent state requests the African Commission to declare the communication inadmissible.

Analysis of the African Commission on the admissibility

63. The African Commission considers that the complainant party, before appearing before it had started to use the remedies available at the local level. The procedure before the administrative chamber of the Supreme Court had lasted five years without any feedback for the complainants, contrary to the regulations in force and in spite of the numerous reminders which had been sent to the said court. The African Commission therefore considers that the delay on the part of the court in the treatment of the case was unduly prolonged.

64. Pertaining to the Compensation Commission set up under the Prime Minister's Office, its operations were highly inefficient as 12 years after its creation and 11 years after hearing the victims, it had not published its report. There also, the African Commission considers that this *ad hoc* Commission, whose establishment was aimed at achieving an amicable settlement of the case, had registered excessive delays in its operations.

65. The respondent state pleads that the legal authorities remain aware of the case at the national level but the African Commission considers the delays by the Administrative Chamber of the Supreme Court of Cameroon excessive.

66. The African Commission further notes that re-introduction of the proceedings on the case before the administrative chamber of the Supreme Court in February 2004, namely after a gap of five years, only took place after the submission of a complaint (to the African Commission), by the victims in April 2003 and after the decision on seizure taken by the Commission on the said complaint in May 2003 (33rd ordinary session), as well as the hearing of the parties to the case in November 2003 during its 34th ordinary session. This leads the African Commission to presume that the re-introduction of the proceedings was not accidental but rather it was due to the action brought by the victims before the African Commission.

67. The African Commission considers that state parties have an obligation to administer, on their territory, clear and diligent justice in order to give satisfaction to the complainants in the shortest possible time, in conformity with the relevant provisions of the African Charter and with the directives and principles of the right to a fair hearing in Africa.

68. In this particular case, the Commission notes that for five years, the administrative chamber of the Supreme Court of the respondent state had not provided any reaction to the complainants, in spite of several appeals by the latter. The respondent state has admitted this fact but attributes it to lack of resources. Consideration of the case has indeed recommenced a short while ago, but one can reasonably conclude that this consideration was largely due to the seizure of the African Commission by the victims. Whereas this should not be the case, that is, justice to be administered by state parties should not wait for the African Commission to be seized of a matter before it is rendered fully, clearly and diligently. This had not been the case with the administrative chamber of the Supreme Court of the respondent state.

69. Concerning the Compensation Commission, an *ad hoc* institution meant to solve the problem amicably at the national level, has shown its limitations in failing to produce any report after 12 years of existence. The respondent state does not refute these allegations, which allows one to believe that they are true. The African Commission therefore considers that this remedy is neither effective nor satisfactory.

70. For these reasons, the African Commission declares the communication admissible.

The merits

71. Pursuant to rule 120 of the Rules of Procedure of the African Commission, once a communication which is submitted under the terms of article 55 of the Charter has been declared admissible, the Commission 'consider it in the light of all the information that the individual and the state party concerned has submitted in writing; it shall make know its observations on the issue.'

72. It appears from the case file that parties have made their conclusions on the merits of the case since 30 March 2005, and that the information provided by the parties to the communication and added to the case file is sufficient to allow a ruling on the merits of the case.

Submissions of the complainants on the merits

73. The complainants are requesting the African Commission to declare the state of Cameroon in violation of the relevant provisions of the African Charter and in particular of articles 1, 2, 4, 7 and 14 of the said Charter and, in consequence, to declare the state of Cameroon bound to pay compensation for the prejudices sustained by the victims of the post electoral events of 1992.

74. The Commission is consequently obliged to examine the alleged violations on the basis of the facts and the law.

On the violation of article 1 of the African Charter

75. Under the terms of article 1 of the African Charter, 'the member states of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enunciated in this Charter and shall undertake to adopt legislative and other measures to give effect to them.'

The arguments of the complainants pertaining to the violation of article 1 of the African Charter

76. From the point of view of the violation of article 1, the complainants contend:

(i) That the African Charter sets out in it's article 1 a general obligation on the protection of rights. In this context, like 'the majority of the human rights treaties, besides requiring the states parties to abstain from all violation or unauthorized restriction of the rights it proclaims, compels them to take positive measures to guarantee the widest possible protection of the individuals under their jurisdiction'.

(ii) That if the recognition referred to by article 1 of the Charter

'bestows them universality,[6] to the guaranteed rights, the taking of appropriate measures allows them to assume real effectiveness'. That the Commission has had the opportunity to underscore this aspect during the examination of a case on the activities of a petroleum consortium in Southern Nigeria by re-affirming that the African Charter was creating a certain number of obligations for the states parties which include, in particular, 'the responsibility of respecting, protecting, promoting and implementing'[7] the rights which it sets out before specifying that 'the governments have a responsibility to protect their citizens, not only by adopting appropriate legislation and by applying them effectively, but also by protecting the said citizens from harmful activities which can be perpetrated by private parties. This responsibility requires positive action on their part'.

(iii) That the interpretation by the Commission of article 1 of the African Charter can be compared with that of the United Nations Human Rights [Committee] on article 2 of the International [Covenant] on Civil and Political Rights (HRC),[8] interpretation in which the HRC affirms that the provision contained in article 2 embraced an obligation of 'absolute character' with 'immediate effect'[9] requiring the states parties to 'take legislative, judicial, administrative, educational and other appropriate measures to fulfill their obligations'.[10]

(iv) That the Commission had to judge that the refusal or the negligence of the authorities of a state party to protect journalists and human rights activists against repeated attacks (harassment, arbitrary arrests, assassination, torture) by the security forces and unidentified groups, constitutes a violation of the said Charter even if this state or its officers are (were) not the direct perpetrators of this violation.[11]

(v) That the present communication provides the Commission with the opportunity to clarify the meaning and scope of the 'positive actions' that the states are required to carry out in order to conform with the conditions of the African Charter, and this, by responding to the affirmation made by the Cameroonian authorities and according to which the implementation of 'all the legal, technical, human and material means at their disposal to control the post-electoral events of Bamenda in 1992 frees them from the obligation of means which is incumbent upon them'.

(vi) That the African Charter really and truly imposes an obligation of result and not one of diligence on the states parties, of guaranteeing to the victims of the October 1992 events the enjoyment and effective exercise of the rights which it proclaims and the lack of respect for which gives rise to a right to compensation for the victims or their dependents and implies, for the Cameroonian state, the responsibility to compensate and the freedom to act against the perpetrator or perpetrators of the violation.

(vii) That, in effect, where, the Commission has not had numerous opportunities to make a ruling on the exact content of article 1 of the

6 See Juan Antonio Carrillo Salcedo 'Art 1' in Louis Edmond Pettiti, Emmanuel Decaux and Pierre-Henry Imbert (eds) *La Convention européenne des droits del'homme: Commentaire article par article* Edition *Economica* (1999) 141; 'the use of the word in article 1 recognizes preferably terms such as protect or respect, suggests that the recognized rights have a value *erga omnes*'.

7 Communication 155/96 *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001)] para 44.

8 See note 22.

9 General Comment 31, CCPR/C/21/Rev.1/Add.13, para 14.

10 General Comment 31, para 7.

11 Cf communication 74/92, *Commission nationale des droits de l'homme et des libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)], para 35.

Charter,[12] it has nonetheless pointed out that this article is the basis of the rights recognized by the African Charter in so far as it confers on it the legally binding nature which is generally attributed to international treaties of this nature and that any violation of one of its provisions would automatically represent a violation of article 1.[13]

Pertaining to the violation of articles 2, 4, 7 and 14 of the African Charter

77. Concerning the violation of articles 2, 4, 7 and 14 the complainants appear to link it to the importance that article 1 represents in the present case, since according to the complainants, article 1 is the only one which defines the scope of the legal obligations contracted by the states parties to the Charter, thereby allowing correct interpretation of the obligations contained in the other provisions of the continental treaty. Thus, the complainants contend that if taken in isolation, article 1 of the Charter commits the state parties to taking all the necessary legislative measures allowing the effective protection of the rights and liberties contained in the Charter, that is to say, of averting or at least of minimizing all risks of violating the exercise or enjoyment of these rights, and in combination with the other relevant provisions of the Charter, the obligation of averting violations imposes on the states parties the obligations of:

- taking preventive measures;
- taking measures so that the enjoyment and exercise of the rights are not hindered by measures of seizure[14] or of expropriation which are not dictated by the satisfaction of a general interest or a public necessity or even the looting or the destruction of the property of natural persons or legal entities;
- putting in place legislation which makes it possible to avert, repress and punish violations to life, but also to take preventive measures of a practical nature to protect the individual whose life is threatened by the actions of another.[15]

78. Thus, the complainants contend:

(i) That the above mentioned articles had been violated by the state of Cameroon since the latter had failed in its obligation to take adequate preventive measures if not to avert or prevent the events in question, at least to reduce them to zero. To support this reasoning, the complainants emphasize that the Cameroonian authorities knew that the Bamenda events were going to take place and that several

[12] See communications 74/92; 137/94, 139/94, 154/96, 161/97 [*International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998)]; 48/90, 50/91, 52/91, 89/93 [*Amnesty International and Others v Sudan* (2000) AHRLR 297 (ACHPR 1999)]; 147/95; 149/96 [*Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000)]; 155/96 [*Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)]; 211/98 [*Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001)]; 223/98 [*Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000).

[13] Cf communications 147/95 and 149/96, *Jawara v The Gambia* para 46.

[14] Cf communication 140/94, 141/94 and 145/95, *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999]] para 54.

[15] Cf *Kilic v Turkey,* 28 March 2000 para 62.

personalities had spoken of threats coming from the Social Democratic Front (SDF) against the security of people and property in the Province.

(ii) That the Prime Minister at the time, Mr Achidi Achu had alluded to the said threats in the campaign speech he made on the 6 October 1992[16] in Kumbo in the North-West Province. The said threats had been later mentioned by the Minister of Communication and Government spokesperson in a press briefing on the political situation of the country during which he had spoken of the existence of a provisional arsenal of the SDF estimated at 300 pistols and 60 combat[17] weapons. Furthermore, in the interview granted to the national daily the *Cameroon Tribune*, the Secretary General of the ruling RDPC Party, had unveiled 'the diabolical plan' concocted at the beginning of the month of October by the opposition to take over power.[18] Moreover, direct threats having been made against all those who support the ruling party, several complaints received by the governor of the North West province brought by citizens wishing to obtain government protection testify to the fact that the territorial administrative authorities had been informed about the SDF's plans.

(iii) That despite these early warning signs, the government of Cameroon, in neglecting to take adequate measures to prevent the events of October 1992 from taking place, thereby violated, even passively, the obligation of prevention contained in article 1 of the African Charter. The state of Cameroon has neither brought the perpetrators of these atrocities to justice, nor paid compensation for the damages suffered by the victims whose right to an effective remedy has been violated.

(iv) That in consequence, the Commission should request the Cameroonian authorities, in conformity with its own jurisprudence,[19] to pay compensation in view of the long delay by the justice administration in examining the complainants' case. In conclusion, the Commission is being requested to reject the arguments of the Cameroonian government, to take note of the violation of articles 1, 4, 7 and 14 of the African Charter; to request the government of Cameroon to institute proceedings against the perpetrators of the atrocities committed between the 23 and 27 October 1992; to determine, on the basis of the evidence presented, the amount of compensation to be paid to the victims based on all the damages suffered by the latter. The complainants further request the Commission to ask the state of Cameroon to amend the laws which are incompatible with the provisions of the African Charter and to fix a deadline for the state of Cameroon relative to the application of any decision that the Commission may take on this matter.

The essence of the arguments of the respondent state in relation to the violation of articles 1, 2, 4, 7 and 14 of the African Charter

79. The respondent state for its part, argues that the violations being alluded to by the complainants are completely groundless since the state of Cameroon has not, in this particular case, deprived any of the complainants of the right to respect for his life and physical integrity nor his right to property. The state of Cameroon took

16 Cf *Cameroon Tribune* No 5231, 7 October 1992, 16.

17 Cf 'The Minister Kontchou Kouamegni reacts to the SDF strategy of chaos' *Cameroon Tribune* No 5246, 26 October 1992, 4.

18 Cf *Cameroon Tribune* No 5231, 7 October 1992, 8.

19 See communication 211/98 *Legal Resources Foundation v Zambia* [(2001) AHRLR 84 (ACHPR 2001)].

measures to save the life and property of individuals during what can be called the Bamenda events.

80. Furthermore, the respondent state intimates that this particular case happened in the context of the years called democratic agitation during which Cameroon had experienced a certain amount of agitation due to the return to a multiparty system and to individual liberties. That for this reason, from May 1990 to December 1992, and due to the organization of two major elections, the legislative then the presidential, public law and order had been disrupted throughout the country thereby giving rise to a large loss of life, and important material damage.

81. According to the respondent state, the specific case of Bamenda, which was of major proportions took place between 23 and 30 October 1992, and was marked notably by the difficulty of the state to maintain law and order. The respondent state further contends that in the case of Bamenda, the implementation of the mandate to protect people and property by using the forces of law and order had been reinforced after 23 October 1992, date on which the results of the presidential elections were proclaimed. Thus, about 548 men had been deployed in the region of Bamenda with motor vehicles and other vehicles for the maintenance of law and order and equipment adapted to deal with the situation on the ground. However, although the post electoral disturbances had taken place in other parts of the territory, these incidents had been extraordinarily violent in Bamenda where they took the form of a generalized insurrection and had been instigated by the militants of an opposition party, the Social Democratic Front (SDF).

82. Moreover, the respondent state contends that:

(i) Following the destruction, a joint Gendarmerie-Police-Justice Commission had been set up and given the responsibility for carrying out investigations on all suspects who had been arrested. However, the individuals who were given heavy charges and had been brought before the State Security Court had later been released on the persistent request of the human rights defender organizations.

(ii) That it happened that the state of Cameroon, having steadfastly implemented the legal, technical, human and material resources at its disposal to contain the post electoral events of Bamenda in 1992, it was thus freed from the obligation of diligence which was its responsibility. The extent of the events in question having the character of *force majeure* was such that they could not be attributed to the state of Cameroon.

(iii) That in view of the full compensation being demanded by the complainants, it should be recalled that the responsibility of the state of Cameroon could not be established in either the unexpected happening of the Bamenda events, or in their management. Consequently, it would be extremely difficult to pay compensation since there is no law which authorizes this sort of payment particularly where the state is not the perpetrator in any way.

(iv) That in relation to the enactment of a law allowing the payment of fair and equitable compensation to the victims of the human rights violations in Cameroon, following the unexpected happening of the

events in question, the following institutions had been successively put in place:

- An organization for political dialogue at the national level called the Tripartite and comprising the state, civil society and the political parties. This Tripartite had made possible the realization of the constitutional amendments of 18 January 1996.
- A Committee then a National Human Rights and Liberties Commission;
- A National Elections Observatory and the strengthening of the National Communications Council.

(v) That taking all these matters into consideration and with all the proper reservations, the African Commission should declare the present communication baseless.

Analysis of the commission with regard to the nature and scope of the obligation contained in article 1 of the African Charter.

83. It follows from the arguments of the facts and the law presented by the complainant party and responded to by the respondent party, that the nature and the scope of the obligation contained in article 1 of the African Charter constitute a matter of special importance in the present communication. Thus, according to the complainant party, article 1 of the African Charter imposes an obligation on the state parties to take measures which can produce concrete results. Whereas it can be inferred from the arguments submitted by the respondent party that the provisions of article 1 of the African Charter impose an obligation of diligence on the state parties.

84. It is therefore up to the African Commission to clarify the nature and scope of this article. It is evident that the legal aspect raised by the argument of the two parties present before the African Commission relates to the question whether article 1 of the African Charter imposes an obligation of diligence or an obligation of result *vis-à-vis* the state parties to the said Charter. In other words, did the state parties to the African Charter make the commitment of taking measures which should give certain results by virtue of article 1?

85. In view of the importance of this question of law, and the importance which the complainant party appears to give article 1, the African Commission should, in the present communication, determine the legal nature of the obligation which the afore-mentioned article imposes on state parties.

The extent or the scope of the obligation contained in article 1 of the Charter

86. Concerning the scope or the extent of the obligation imposed by article 1 of the African Charter, it is important to point out that it

had been clarified *sui generis,*[20] (in a distinctive manner) and that the Commission's jurisprudence is abundant enough in this area.

87. Thus, according to the Commission's jurisprudence, article 1 confers on the Charter the legally binding character generally attributed to international treaties of this nature. The responsibility of the state party is established by virtue of article 1 of the Charter in case of the violation of any of the provisions of the Charter. Article 1 places the states parties under the obligation of respecting, protecting, promoting and implementing the rights.

88. The respect for the rights imposes on the state the negative obligation of doing nothing to violate the said rights. The protection targets the positive obligation of the state to guarantee that private individuals do not violate these rights. In this context, the Commission ruled that the negligence of a state to guarantee the protection of the rights of the Charter having given rise to a violation of the said rights constitutes a violation of the rights of the Charter which would be attributable to this state, even where it is established that the state itself or its officials are not directly responsible for such violations but have been perpetrated by private[21] individuals.

89. According to the permanent jurisprudence of the Commission, article 1 imposes restrictions on the authority of the state institutions in relation to the recognized rights. This article places on the state parties the positive obligation of preventing and punishing the violation by private individuals of the rights prescribed by the Charter. Thus any illegal act carried out by an individual against the rights guaranteed and not directly attributable to the state can constitute, as had been indicated earlier, a cause of international responsibility of the state, not because it has itself committed the act in question, but because it has failed to exercise the conscientiousness required to prevent it from happening and for not having been able to take the appropriate measures to pay compensation for the prejudice suffered by the victims.[22]

90. In this context of prevention, the state should carry out investigations so as to detect the various risks of violence and take the necessary preventive measures. The problem here does not concern so much the acts violating the rights but rather of knowing whether the state took the tangible measures to prevent the imminent risks of perpetration of the said acts. It is not a question of

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20 See communications: 74/92 ; 137/94 ; 48/90 ; 50/91; 52/91; 89/93; 139/94; 154/96; 161/97; 147/95; 149/96; 155/96; 211/98; 223/98, in which the African Commission has had to clarify the scope of art 1 of the Charter.

21 Communication 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)]; Communication 155/96, *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.

22 Communication 245/2002, *Zimbabwe Human Rights NGO Forum v Zimbabwe* [(2006) AHRLR 128 (ACHPR 2006)] para 143.

inculpating the state for its lack of conscientiousness regarding any act perpetrated in relation to the guaranteed rights but of knowing whether the state, considering the imminent risks of serious violations, used due diligence that was required. Under the terms of comparative law, it is the position that was taken by the Inter American Human Rights Court in the *Vélasquez Rodriguez* case in the following terms:

91. 'an illegal act which violates human rights and which is initially not directly imputable to a state (for example because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of state, not because of the act itself, but because of the absence of due diligence to prevent the violation or to respond to it as required by the convention.'

92. In the case *Zimbabwe Human Rights Forum v Zimbabwe*, the Commission had indicated and ruled that the doctrine of due diligence should be applied on a case by case basis.

On the nature of the obligation contained in article 1 of the Charter

93. The scope of the state's general obligation to protect, sanctioned by article 1 of the Charter having been clarified, it is therefore necessary to determine the nature of this obligation. Is it an obligation of diligence or an obligation of result?

94. Though by their origin, the obligation of diligence and the obligation of result emanate from the domestic law systems, particularly from continental civil law, this term has also been frequently used in international law since the 20th century.[23]

95. The obligation of diligence consists, for a party to a contract, in placing at the disposal of the other party all the available resources without however guaranteeing the result that the said resources would produce. Thus, in the context of this obligation, the debtor undertakes to deploy all efforts to provide the creditor with a given requirement, but without being able to guarantee it. It is the case of the doctor who undertakes to provide all the necessary care to his patient without however being able to guarantee the recovery of the said patient.

[23] The distinction between these two types of obligations in international law has for the first time been established in explicit terms by D Donatti who has made it a general principle (D Donati *I Trattati internazionali nel diritto costituzionale*, Turin, Unione tipografico-editrice torinese, 1906, vol I, 343). It had already implicitly been done by H Triepel where he highlighted the difference between domestic law immediately applicable and domestic law that is internationally pertinent (H Triepel, Volkerrecht und Landesrecht, Leipzig Hirschfeld, 1899, 299).

96. The assertion of such a responsibility has the effect of compelling the party on whom reposes the obligation of diligence to pay compensation for the damages it may have caused in the execution of this obligation. This compensation takes the form of a conviction for the payment of damages with interest, that is to say an obligation to pay a sum of money. It is in this context that the notion of obligations arises, to which the respondent state alludes in talking about its resources on the one hand and its corollary, the obligations of result, on the other.

97. On the contrary, the obligation of result pre-supposes the commitment of the debtor to obtain a specific result. Thus, in the context of this obligation, the transporter of a traveller undertakes to carry the passenger from point A to point B safe and sound.

98. Pertaining to evidence, the evidence of a fault is only required from the complainant in the case of obligations of diligence since the complainant has to prove that the debtor has not deployed all the required efforts to obtain the success of the undertaking. On the other hand, the creditor of an obligation of result is exempted from providing such evidence. In effect, all he has to do is to establish that the promised result has not been obtained; the debtor can only obtain release from his responsibility by establishing that the non-execution is due to circumstances beyond his control which cannot be attributed to him but to *force majeure*. The *force majeure* represents a foreign event which is both unforeseeable and uncontrollable which is at the root of an injury.[24]

99. Generally, in international law, the notion of obligation of diligence and that of result emanate from the interpretation of articles 20 and 21 of the draft articles of the International Law Commission (ILC) pertaining to the responsibilities of states. It must be noted that the comments from these two articles were adopted by the ILC which caused the latter to make a distinction between the violation of international obligations referred to as 'behaviour' or 'diligence' and the violation of obligations otherwise called 'result'.[25]

100. Under article 20 of the draft articles of the ILC is entitled 'Violation of an international obligation requiring the adoption of a predetermined specific behaviour when the behaviour of the said state is at variance with the behaviour specified under that obligation'.

101. In respect of article 21 of the draft ILC articles which is entitled 'Violation of an international obligation requiring the attainment of a specific result', the provision stipulates that:

[24] Aubert *Introduction au droit et thèmes fondamentaux du droit civil* (1995) 252.
[25] Yearbook of the International Law Commission, 1977, Vol II, Part 2, page 12 onwards.

> (1) A state is in violation of an obligation requiting it to choose a determined result if by the behaviour exhibited, the state does not ensure the realisation of the expected result required from it under the terms of that obligation.
>
> (2) If the behaviour of the state has created a situation that does not conform to the result required from it by the international obligation, but that it emerges from the obligation that this result or an equivalent result can all the same be achieved by the subsequent behaviour of the state, then a violation of the obligation occurs only when the state also fails by its subsequent behaviour to achieve the result expected from her by that obligation ...

102. Thus, if the obligation of diligence requires that the state adopts specific behaviours or actions to attain specific results, then under obligation of result, the state enjoys the freedom of choice and action to achieve the result required by that obligation.

103. Consequently, in the case *Coloza v Italy*,[26] the European Court of Human Rights declared and rendered judgement that 'the contracting states (parties) enjoy very wide discretion in terms of the calculation of the choices and means to ensure that their legal systems are in keeping with the provisions of article 6 paragraph 1 (Art 6-1) in this field. The task of the court is not to indicate to the states these means, but to determine if the result required by the Convention had been achieved'.

104. Similarly, in the *De Cubber v* Belgium,[27] the European Court of Human Rights observed that its task was to determine if the contracting states achieved the result required by the European Convention and that its task was not to point out specifically the means used to arrive at that result.

105. Moreover, in the judgement pronounced on 19 January 2009 in the case relating to the request for interpretation of the judgment of 31 March 2004, in the *Avena* case and other Mexican citizens (*Mexico v the United States of America*),[28] the International Court of Justice which had been seized by Mexico for the interpretation of paragraph 153 of the aforementioned judgement as imposing on the United States of America an obligation of result, maintained that 'It is true that the obligation enunciated in this paragraph is an obligation of result which should manifestly be enforced unconditionally'.[29]

106. Thus, the question that arises generally is to appreciate, on the one hand, the ultimate purpose or objective of the rights prescribed by the African Charter on Human and People's Rights and on the other hand, whether yes or no the obligation prescribed in article 1 of the Charter seeks to attain a purpose, an objective or to achieve a result through the provisions contained therein.

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26 Application 9024/80 (1985) Series A, vol 89.
27 Application 9186/80 (1984) para 35.
28 ICJ, judgment of 19 January 2009.
29 Para 44.

107. In the view of the Commission, the distinction between the obligation of diligence and that of result should not make one lose sight of the fact that all obligations contained in a treaty, convention or a charter seek to attain an objective, a purpose or a result. The governments of the state parties are linked to the people living on their territory by a social contract consisting of ensuring the security and guaranteeing the fundamental rights, including the right to life and respect for the physical and material integrity of the citizens. Where the rights, responsibilities and freedoms recognized by the state parties to the Charter can hardly pose major problems, since these regulations are outlined in the articles 2 to 29 of the Charter and their recognition emanates from the will of the states themselves to ratify the Charter, nonetheless this recognition ensues from the commitment made by these states to take tangible measures capable of implementing the provisions prescribed by the Charter.

108. It is also important to clarify that the signature, acceptance and ratification by the states of the provisions contained in the Charter, the preparation or the adoption of legal human rights instruments only constitute, in themselves, the beginning of the indispensable exercise of promotion, protection and the reparation of human and peoples' rights. The practical implementation of these legal instruments through the state institutions endowed with creditor, material and human resources, is also of considerable importance. It is not enough to make do with taking measures, these measures should also be accompanied with institutions that produce tangible results. Furthermore, the Periodic Report imposed on the state parties in the context of article 62 of the African Charter is part of the procedure placed at the disposal of the African Commission to verify the results obtained by the states regarding their commitment as outlined in article 1 of the said Charter.

109. Where it is true that the laws guaranteeing the rights and freedoms, those criminalizing the given facts and providing for penalties against the perpetrators of the said facts, as well as the state institutions which implement these instruments use the resources at the disposal of the citizens, it is also true that the decisions of the courts and tribunals made in relation to the violations of these rights and the results of the execution of the said decisions, contribute to restoring the rights of the victims.

110. It follows from the above that article 1 of the African Charter imposes on the state parties the obligation of using the necessary diligence to implement the provisions prescribed by the Charter since the said diligence has to evolve in relation to the time, space and circumstances, and has to be followed by practical action on the ground in order to produce concrete results. Thus, in its decision on Communication 74/92, the Commission said that the governments have the responsibility of protecting their citizens not only through

appropriate legislation and its effective enforcement but also by protecting them against injurious acts which can be perpetrated by third parties.

111. In fact, in the Commission's view, it is an obligation of result that article 1 of the African Charter imposes on the states parties. In effect, each state has the obligation of guaranteeing the protection of the human rights written in the Charter by adopting not only the means that the Charter itself prescribes, in particular all the necessary legislative measures for this purpose but in addition measures of their choice that the Charter called for by article 1 and it therefore defined as one of result.

112. In accordance with its traditional commitment to protect the rights guaranteed by the Charter, the state party is obliged to ensure the effective protection of human rights through out its territory. If this obligation were that of an obligation of diligence the guaranteeing of human rights would be the object of legal insecurity liable to release the state parties to the human rights protection instruments from any responsibility of effective protection. It is in taking into account the compelling nature of the protection of human rights that the human rights instruments set up control institutions to ensure that the obligations ensuing from these instruments are effectively implemented.

Analysis of the Commission with regard to the application of the case in point

113. The legal nature of the obligations outlined in the provisions of article 1 of the Charter having been clarified, the specific question raised with regard to its application to the case in point is that of knowing whether the state of Cameroon was held by an obligation of diligence or an obligation of result and whether the circumstance of *force majeure* cited by the respondent state is fulfilled in order to release the said state from its obligation.

114. The complainant contends that the state of Cameroon is bound by an obligation of result and consequently is compelled to pay compensation for the injuries suffered by the victims of the 1992 post-electoral events. The state of Cameroon on her part maintains that it was bound by an obligation of diligence as the 1992 events were of an insurrectional character. They are akin to a situation of *force majeure* which the means employed by the government could not curtail. Consequently, the state of Cameroon avers that it is free from any liability.

115. Pertaining to the case in point, considering the definition of the legal nature indicated above, the Commission is of the view that the obligations which ensue from article 1 impose on the state of Cameroon the need to implement all the measures required to

produce the result of protecting the individuals living on its territory. The use of the legal, technical, human and material resources that the state of Cameroon claims to have did not produce the expected result, namely that of guaranteeing the protection of human rights. For the post electoral events which gave rise to serious violations against the lives and property of the citizens would not have taken place if the state which, through its investigations knew or should have known about the planning of the said events, had taken the necessary measures to prevent their happening.

116. The events in question having taken place the day after the announcement of the results of the presidential elections, the authorities only acted four days after the exploding of the hostilities, which promoted the magnitude of the violence and the serious violations of human rights and destruction of property. It has been established that, under the circumstances, the respondent state has failed in its obligation to protect, considering its lack of diligence and allowed the destruction of lives and property. Furthermore, by invoking the circumstances of *force majeure* to free itself from its responsibility, the state of Cameroon has implicitly shown that it had been held by an obligation of result in this particular case.

117. In principle, the circumstance of *force majeure* which assumes the characters of unpredictability, irresistibility and imputability can be invoked if the conditions had been fulfilled at the time of the events. In this case, the said characters of unpredictability, irresistibility and imputability required by a situation of *force majeure* and which the respondent party is invoking cannot be applicable for, according to the respondent state itself, disturbances of public law and order existed in the country since May 1990 and specifically during the holding of the elections, and that moreover, the threats[30] of the 11, 18, 19 and 22 October 1992 from the SDF, the opposition party and qualified by the respondent state as an atmosphere of political intimidation and counter intimidation, sufficiently prove the existence of early warning signs of the events in question and consequently the predictability of the events.

118. What is more, the respondent state had manifested its control of the territory and therefore its ability to stand up to the perpetrators of the post electoral events, by instituting a state of siege a few days after the events in question; had this state of siege been instituted earlier, the events in question would have at least been reduced in scope if not entirely quelled.

119. The obligations prescribed by the African Charter in its article 1 impose on the states parties (the state of Cameroon included) the need to put in place all measures liable to produce the result of

[30] Cf Cameroun Tribune No 5231 of 7 October 1992 p 8 and 16, Cameroun Tribune No 5246 of 26 October 1992 p 4.

preventing all violations of the African Charter over their entire territory. These are not only violations which could emanate from the state machinery itself or those from non state actors. The implementation of the legal, technical, human and material means alluded to by the state of Cameroon should have, in principle, produced the result of preventing the events in question since the said events were foreseeable; the said means should at least, have served to bring the perpetrators to justice, have them judged and sentenced in accordance with the law and restore the rights of the victims or their dependents after the said events had taken place. This is an *a posteriori* result which should have produced results considering the means chosen by the state of Cameroon itself.

120. Each state party to the African Charter is responsible for the security of the people and property living everywhere on its territory. Having a character of *erga omnes*,[31] such an obligation constitutes part of those which cover a particular interest for all the states parties to the African Charter and for the entire international Community since it is recognized in both domestic and international law. Therefore, as underscored by the respondent state, if it cannot be directly responsible for the events, the state of Cameroon cannot also extricate itself from its responsibility for the actions of others which are a result of its failure to conform to the provisions prescribed by article 1 of the African Charter and therefore of its obligation of result.

121. Consequently, in having failed to prevent the 1992 post electoral violence even though there were early warning signs (evidently) of the events in question and not having obtained the intended results mentioned above, the state of Cameroon has failed in its obligation of result imposed on it by article 1 of the African Charter, and that in consequence the respondent state is hardly in a position to invoke the circumstances of *force majeure*. It therefore follows that the victims and their dependents should have their rights restored in full.

Analysis of the Commission with regard to the violation of articles 2, 4, 7 and 14 of the African Charter

122. By invoking the violation of articles 2 and 7 of the Charter, the complainants wish to contest the freezing of the petition by the victims pertaining to responsibility of the issue which has been pending before the Administrative Chamber of the Supreme Court since 1998, in order to obtain full compensation of the corporal and material damages suffered. For the complainants this procedure constitutes a violation of the right to an effective remedy.

[31] Cf *Barcelona Traction* judgment, ICJ, 5 February 1970.

123. Article 2 stipulates that: 'Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or other status'.

124. It appears that complainants drew the infringement of the enjoyment of their rights and freedoms hence the violation of article 2 of the Charter, from the fact that the respondent state failed to take adequate measures to prevent the violence which led to the physical harm and material damage suffered by the victims.

125. The African Commission is of the view that there is no doubt in the present case that the victims of the post elections violence suffered from damage which infringed the enjoyment of their rights. Respondent state did not debate the fact of harm being caused to the victims, but rather argued that the post election events are act of God and therefore it is beyond the capability of the state of Cameroon which should not be held liable.

126. The African Commission is therefore in the position to hold that the provisions of article 2 of the African Charter have been violated because the victims were enjoying their rights and freedoms when they were attacked. Such attacks which infringed their rights and freedoms were made possible because the state of Cameroon failed to fulfill its obligation to protect which incumbent upon the state.

127. Article 7 stipulates: 'Every individual shall have the right to have his cause heard. This right comprises: (d) the right to be tried within a reasonable time by an impartial court or tribunal'.

128. The term 'remedy' refers to 'any procedure by means of which one submits a constitutive act of an alleged violation of the [Charter] to an institution qualified in this respect, for the purpose of obtaining, as the case may be, a cessation of the act, its annulment, its amendment or compensation'.[32] Effective remedy is remedy which not only exists *de facto*, but also is accessible to the party concerned and is appropriate. The petition should be appropriate so as to allow the denunciation of the alleged violations and the payment of appropriate compensation.

129. However, the effectiveness of the remedy is not linked to the expected outcomes. Nonetheless, the effects in question should be of a nature to remedy the alleged violation, otherwise the effective character of the remedy disappears. Finally, there is need to specify that the right to effective remedy sanctions an obligation of diligence, for what is guaranteed is the existence of an appropriate

[32] Louis Edmond Pettiti, Emmanuel Decaux and Pierre-Henry Imbert (eds) *La Convention européenne des droits del'homme: Commentaire article par article* Edition *Economica* (1999) 467-468.

remedy and not its favourable result, but an unfavourable jurisprudence renders the remedy useless.

130. Considering all of the foregoing, the Commission is of the view that the complainants did not benefit from the right to an effective remedy, for if it was established that the remedy was available and assessable, it should be noted that it had not been appropriate since the fact that it was frozen made it impossible for the court to make a ruling. The petition remained pending for more than five years before the complainants decided to seize the African Commission in 2003.

131. With regard to articles 4 and 14, the complainants highlight the violations to the physical integrity and to the material damages suffered by the victims.

132. Under the terms of article 4, 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.'

133. Article 14 provides that 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

134. In the light of their arguments, it would appear that the parties seem to agree on the effectiveness of the violations to the lives of the victims and the considerable material damages which resulted from the violence of the post-electoral events. The government has shown this agreement by setting up a Rescue Committee for the Victims, in conformity with the Law of 26 June 1964 which authorizes the state to provide assistance within the limits of the amounts provided for this purpose or constant assistance in any other form. The said Committee had evaluated the amount of damages –interest at five billion, eight hundred and eight million, three hundred and ten thousand, and eight hundred and eighty francs CFA (5 808 310 880). From all appearances, the victims had not been entirely unprejudiced.

135. The respondent state observed in its arguments that it was not at all a compensation on its part but a show of solidarity, because it is not directly responsible for the prejudices suffered by the victims, and that it was an act by private individuals that the victims could bring to justice so as to have satisfaction with respect to their grievances.

136. The Commission is of the view that the responsibility of the government has been established. It therefore follows that the government should pay compensation for the prejudices suffered. Despite the fact that the government is denying it, it understood that it could not remain insensitive to its obligation to pay fair

compensation to the victims, for this reason it set up a Committee to assess the damages suffered by the complainants.

Decision of the Commission

137. Based on the foregoing reasons, the African Commission decides that:

(i) The provisions of article 1 of the African Charter impose on states parties an obligation of result;

(ii) The state of Cameroon failed in its general obligation as set forth and sanctioned under article 1 of the African Charter and consequently the state of Cameroon has an obligation of result;

(iii) Due to its obvious lack of diligence, the state of Cameroon is held responsible for the violation of articles 2, 4, and 14 of the African Charter; and therefore, the state of Cameroon is responsible for the acts of violence which took place on its territory which gave rise to human rights violations, whether these acts had been committed by the state of Cameroon itself or by people other than the state;[33]

(iv) The state of Cameroon had moreover violated the provisions of article 7 of the same Charter;

138. Recommends to the state of Cameroon to:

(i) Take all the necessary measures for guaranteeing the effective protection of human rights at all times, and everywhere both in times of peace and in times of war;

(ii) Pursue its commitment to give fair and equitable compensation to the victims and without delay, to pay fair and equitable compensation for the prejudices suffered by the victims or their beneficiaries;

(iii) That the amount of compensation for the damages and interest be fixed in accordance with applicable laws.

[33] The jurisprudence of the Commission is constant regarding the responsibility of states towards others.

KENYA

Centre for Minority Rights Development and Others v Kenya

(2009) AHRLR 75 (ACHPR 2009)

Communication 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*

Decided at the 46th ordinary session, November 2009, 27th Activity Report.

Rights of indigenous people to enjoyment of property and cultural life

Admissibility (local remedies, exhaustion of 59, 66)
Indigenous peoples (definition,144 –162)
Property (land rights of indigenous people 161, 175 – 239)
Cultural life (right to culture 240 – 252)
Peoples' right to natural resources (253 – 269)
Peoples' right to development (270 – 299)

Summary of alleged facts

1. The complaint is filed by the Centre for Minority Rights Development (CEMIRIDE) with the assistance of Minority Rights Group International (MRG) and the Centre on Housing Rights and Evictions (COHRE) — which submitted an *amicus curiae* brief on behalf of the Endorois community. The complainants allege violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

2. The complainants allege that the government of Kenya in violation of the African Charter on Human and Peoples' Rights (the African Charter), the Constitution of Kenya and international law, forcibly removed the Endorois from their ancestral lands around the Lake Bogoria area of the Baringo and Koibatek Administrative Districts, as well as in the Nakuru and Laikipia Administrative Districts

within the Rift Valley Province in Kenya, without proper prior consultations, adequate and effective compensation.

3. The complainants state that the Endorois are a community of approximately 60 000 people[1] who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington game reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria game reserve in 1978 by the government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land. The complainants allege that since 1978 the Endorois have been denied access to their land.

4. The complainants state that apart from a confrontation with the Masai over the Lake Bogoria region approximately three hundred years ago, the Endorois have been accepted by all neighbouring tribes as *bona fide* owners of the land and that they continued to occupy and enjoy undisturbed use of the land under the British colonial administration, although the British claimed title to the land in the name of the British crown.

5. The complainants state that at independence in 1963, the British crown's claim to Endorois land was passed on to the respective county councils. However, under section 115 of the Kenyan Constitution, the county councils held this land in trust, on behalf of the Endorois community, who remained on the land and continued to hold, use and enjoy it. The Endorois' customary rights over the Lake Bogoria region were not challenged until the 1973 gazetting of the land by the government of Kenya. The complainants state that the act of gazetting and, therefore, dispossession of the land is central to the present communication.

6. The complainants state that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. The complainants state that Lake Bogoria is central to the Endorois religious and traditional practices. They state that the community's historical prayer sites, places for circumcision rituals, and other cultural ceremonies are around Lake Bogoria. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region. The complainants claim that the Endorois believe that the spirits of all Endorois, no matter where they are buried, live on in the Lake, with annual festivals taking place at the lake. The complainants further claim that the Endorois believe

[1] The Endorois have sometimes been classified as a sub-tribe of the Tugen tribe of the Kalenjin group. Under the 1999 census, the Endorois were counted as part of the Kalenjin group, made up of the Nandi, Kipsigis, Keiro, Tugen and Marakwet among others.

that the Monchongoi Forest is considered the birthplace of the Endorois and the settlement of the first Endorois community.

7. The complainants state that despite the lack of understanding of the Endorois community regarding what had been decided by the respondent state, the Kenyan Wildlife Service (KWS) informed certain Endorois elders shortly after the creation of the game reserve that 400 Endorois families would be compensated with plots of 'fertile land'. The undertaking also specified, according to the complainants, that the community would receive 25% of the tourist revenue from the game reserve and 85% of the employment generated, and that cattle dips and fresh water dams would be constructed by the respondent state.

8. The complainants allege that after several meetings to determine financial compensation for the relocation of the 400 families, the KWS stated it would provide 3 150 Kenya shillings per family. The complainants allege that none of these terms have been implemented and that only 170 out of the 400 families were eventually given some money in 1986, years after the agreements were concluded. The complainants state that the money given to the 170 families was always understood to be a means of facilitating relocation rather than compensation for the Endorois' loss.

9. The complainants state that to reclaim their ancestral land and to safeguard their pastoralist way of life, the Endorois petitioned to meet with President Daniel Arap Moi, who was their local member of parliament. A meeting was held on 28 December 1994 at his Lake Bogoria Hotel.

10. The complainants state that as a result of this meeting, the President directed the local authority to respect the 1973 agreement on compensation and directed that 25% of annual income towards community projects be given to the Endorois. In November of the following year, upon being notified by the Endorois community that nothing had been implemented, the complainants state that President Moi again ordered that his directives be followed.

11. The complainants state that following the non-implementation of the directives of President Moi, the Endorois began legal action against Baringo and Koibatek county councils. Judgment was given on 19 April 2002 dismissing the application.[2] Although the High Court recognised that Lake Bogoria had been trust land for the Endorois, it stated that the Endorois had effectively lost any legal claim as a result of the designation of the land as a game reserve in 1973 and in 1974. It concluded that the money given in 1986 to 170 families for the cost of relocating represented the fulfilment of any duty owed by

[2] *William YatichSitetalia, William ArapNgasia et al v Baringo Country Council*, High Court judgment of 19 April 2002 Civil Case No 183 of 2000 6.

the authorities towards the Endorois for the loss of their ancestral land.

12. The complainants state that the High Court also stated clearly that it could not address the issue of a community's collective right to property, referring throughout to 'individuals' affected and stating that 'there is no proper identity of the people who were affected by the setting aside of the land … that has been shown to the (c)ourt'. The complainants also claim that the High Court stated that it did not believe Kenyan law should address any special protection to a people's land based on historical occupation and cultural rights.

13. The complainants allege that since the Kenyan High Court case in 2000, the Endorois community has become aware that parts of their ancestral land have been demarcated and sold by the respondent state[3] to third parties.

14. The complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock. Both mining operations and the demarcation and sale of land have continued despite the request by the African Commission to the President of Kenya to suspend these activities pending the outcome of the present communication.

15. The complainants state that following the commencement of legal action on behalf of the community, some improvements were made to the community members' access to the Lake. For example, they are no longer required to pay game reserve entrance fees. The complainants, nevertheless, allege that this access is subject to the game reserve authority's discretion. They claim that the Endorois still have limited access to Lake Bogoria for grazing their cattle, for religious purposes, and for collecting traditional herbs. They also state that the lack of legal certainty surrounding access rights and rights of usage renders the Endorois completely dependent on the game reserve authority's discretion to grant these rights on an *ad hoc* basis.

16. The complainants claim that land for the Endorois is held in very high esteem, since tribal land, in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life. Land, they claim, belongs to the community and not the individual and is essential to the preservation and survival as a traditional people. The complainants claim that the Endorois health,

[3] Depending on the context, *Kenyan authorities* and *respondent state* are used in this text interchangeably to mean the government of Kenya.

livelihood, religion and culture are all intimately connected with their traditional land, as grazing lands, sacred religious sites and plants used for traditional medicine are all situated around the shores of Lake Bogoria.

17. The complainants claim that at present the Endorois live in a number of locations on the periphery of the reserve – that the Endorois are not only being forced from fertile lands to semi-arid areas, but have also been divided as a community and displaced from their traditional and ancestral lands. The complainants claim that for the Endorois, access to the Lake Bogoria region, is a right for the community and the government of Kenya continues to deny the community effective participation in decisions affecting their own land, in violation of their right to development.

18. The complainants further allege that the right to legal representation for the Endorois is limited, in that Juma Kiplenge, the lawyer and human rights defender who was representing the 20 000 Endorois nomadic pastoralists, was arrested in August 1996 and accused of 'belonging to an unlawful society'. They claim that he has also received death threats.

19. The complainants allege that the government's decision to gazette Endorois traditional land as a game reserve, which in turn denies the Endorois access to the area, has jeopardized the community's pastoral enterprise and imperilled its cultural integrity. The complainants also claim that 30 years after the evictions began, the Endorois still do not have full and fair compensation for the loss of their land and their rights on to it. They further allege that the process of evicting them from their traditional land not only violates Endorois community property rights, but spiritual, cultural and economic ties to the land are severed.

20. The complainants allege that the Endorois have no say in the management of their ancestral land. The Endorois Welfare Committee, which is the representative body of the Endorois community, has been refused registration, thus denying the right of the Endorois to fair and legitimate consultation. This failure to register the Endorois Welfare Committee, according to the complainants, has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community. The complainants further submit that the denial of domestic legal title to their traditional land, the removal of the community from their ancestral home and the severe restrictions placed on access to the Lake Bogoria region today, together with a lack of adequate compensation, amount to a serious violation of the African Charter. The complainants state that the Endorois community claims these violations both for themselves as a people and on behalf of all the individuals affected.

21. The complainants allege that in the creation of the game reserve, the respondent state disregarded national law, Kenyan constitutional provisions and, most importantly, numerous articles of the African Charter, including the right to property, the right to free disposition of natural resources, the right to religion, the right to cultural life and the right to development.

Articles alleged to have been violated

22. The complainants seek a declaration that the Republic of Kenya is in violation of articles 8, 14, 17, 21 and 22 of the African Charter. The complainants are also seeking:

- Restitution of their land, with legal title and clear demarcation.
- Compensation to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture.

Procedure

23. On 22 May 2003, the Centre for Minority Rights and Development (CEMIRIDE) forwarded to the Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) a formal letter of intent regarding the forthcoming submission of a communication on behalf of the Endorois community.

24. On 9 June 2003, the Secretariat wrote a letter to the Centre for Minority Rights and Development, acknowledging receipt of the same.

25. On 23 June 2003, the Secretariat wrote a letter to Cynthia Morel of Minority Rights Group International, who is assisting the Centre for Minority Rights Development, acknowledging her communication and informed her that the complaint would be presented to the upcoming 34th ordinary session of the African Commission.

26. A copy of the complaint, dated 28 August 2003, was sent to the Secretariat on 29 August 2003.

27. At its 34th ordinary session held in Banjul, The Gambia, from 6 to 20 November 2003, the African Commission examined the complaint and decided to be seized thereof.

28. On 10 December 2003, the Secretariat wrote to the parties informing them of this decision and further requesting them to forward their written submissions on admissibility before the 35th ordinary session.

29. As the complainants had already sent their submissions, when the communication was being sent to the Secretariat, the Secretariat wrote a reminder to the respondent state to forward its written submissions on admissibility.

30. By a letter of 14 April 2004, the complainants requested the African Commission on Human and Peoples' Rights (the African Commission) to be allowed to present their oral submissions on the matter at the session.

31. On 29 April 2004, the Secretariat sent a reminder to the respondent state to forward its written submissions on admissibility of the communication.

32. At its 35th ordinary session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission examined the complaint and decided to defer its decision on admissibility to the next session. The African Commission also decided to issue an urgent appeal to the government of the Republic of Kenya, requesting it to stay any action or measure by the state in respect of the subject matter of this communication, pending the decision of the African Commission, which was forwarded on 9 August 2004.

33. At the same session, a copy of the complaint was handed over to the delegation of the respondent state.

34. On 17 June 2004, the Secretariat wrote to both parties informing them of this decision and requesting the respondent state to forward its submissions on admissibility before the 36th ordinary session.

35. A copy of the same communication was forwarded to the respondent state's High Commission in Addis Ababa, Ethiopia on 22 June 2004.

36. On 24 June 2004, the Kenyan High Commission in Addis Ababa, Ethiopia, informed the Secretariat that it had conveyed the African Commission's communication to the Ministry of Foreign Affairs of Kenya.

37. The Secretariat sent a similar reminder to the respondent state on 7 September 2004, requesting it to forward its written submissions on the admissibility of the communication before the 36th ordinary session.

38. During the 36th ordinary session held in Dakar, Senegal, from 23 November to 7 December 2004, the Secretariat received a hand-written request from the respondent state for a postponement of the matter to the next session. At the same session, the African Commission deferred the case to the next session to allow the respondent state more time to forward its submissions on admissibility.

39. On 23 December 2004, the Secretariat wrote to the respondent state informing it of this decision and requesting it to forward its submissions on admissibility as soon as possible.

40. Similar reminders were sent out to the respondent state on 2 February and 4 April 2005.

41. At its 37th ordinary session held in Banjul, The Gambia, from 27 April to 11 May 2005, the African Commission considered this communication and declared it admissible after the respondent state had failed to cooperate with the African Commission on the admissibility procedure despite numerous letters and reminders of its obligations under the Charter.

42. On 7 May 2005, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their arguments on the merits.

43. On 21 May 2005, the Chairperson of the African Commission addressed an urgent appeal to the President of the Republic of Kenya on reports received alleging the harassment of the Chairperson of the Endorois Assistance Council who is involved in this communication.

44. On 11 and 19 July 2005, the Secretariat received the complainants' submissions on the merits, which were forwarded to the respondent state.

45. On 12 September 2005, the Secretariat wrote a reminder to the respondent state.

46. On 10 November 2005, the Secretariat received an *amicus curiae* brief on the case from COHRE.

47. At its 38th ordinary session held from 21 November to 5 December 2005 in Banjul, The Gambia, the African Commission considered the communication and deferred its decision on the merits to the 39th ordinary session.

48. On 30 January 2006, the Secretariat informed the complainants of this decision.

49. By a *note verbale* of 5 February 2006, which was delivered by hand to the Ministry of Foreign Affairs of the Republic of Kenya through a member of staff of the Secretariat who travelled to the country in March 2006, the Secretariat informed the respondent state of this decision by the African Commission. Copies of all the submissions by the complainants since the opening of this file were enclosed thereto.

50. By an email of 4 May 2006, the Senior Principal State Counsel in the Office of the Attorney-General of the respondent state requested the African Commission to defer the consideration of this communication on the basis that the respondent state was still preparing a response to the matter which it claimed to be quite protracted and involved many departments.

51. By a *note verbale* of 4 May 2006, which was received by the Secretariat on the same day, the Solicitor-General of the respondent

state formally requested the African Commission to defer the matter to the next session noting mainly that due to the wide range of issues contained in the communication, its response would not be ready for submission before the 39th ordinary session.

52. At its 39th ordinary session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and deferred its consideration of the same to its 40th ordinary session to await the outcome of amicable settlement negotiations underway between the complainants and the respondent state.

53. The Secretariat of the African Commission notified the parties of this decision accordingly.

54. On 31 October 2006, the Secretariat of the African Commission received a letter from the complainants reporting that the parties had had constructive exchanges on the matter and that the matter should be heard on the merits in November 2006 by the African Commission. The complainants also applied for leave to have an expert witness heard during the 40th ordinary session.

55. At the 40th ordinary session, the African Commission deferred its decision on the merits of the communication after having heard the expert witness called in by the complainant. The respondent state also made presentations. Further documents were submitted at the session and, later on, during the intersession; more documentation was received from both parties before the 41st ordinary session.

56. During the 41st ordinary session, the complainants submitted their final comments on the last submission by the respondent state.

Decision on admissibility

57. The respondent state has been given ample opportunity to forward its submissions on admissibility on the matter. Its delegates at the previous two ordinary sessions of the African Commission were supplied with hard copies of the complaint. There was no response from the respondent state. The African Commission has no option but to proceed with considering the admissibility of the communication based on the information at its disposal.

58. The admissibility of communications brought pursuant to article 55 of the African Charter is governed by the conditions stipulated in article 56 of the African Charter. This article lays down seven conditions, which generally must be fulfilled by a complainant for a communication to be admissible.

59. In the present communication, the complaint indicates its authors (article 56(1)), is compatible with the Organisation of African Unity/African Union Charters and that of the African Charter on

Human and Peoples' Rights (article 56(2)), and it is not written in disparaging language (article 56(3)). Due to lack of information that the respondent state should have supplied, if any, the African Commission is not in a position to question whether the complaint is exclusively based on news disseminated through the mass media (article 56(4)), has exhausted local remedies (article 56(5)), and has been settled elsewhere per article 56(7) of the African Charter. With respect to the requirement of exhaustion of local remedies, in particular, the complainants approached the High Court in Nakuru, Kenya, in November 1998. The matter was struck out on procedural grounds. A similar claim was made before the same court in 2000 as a constitutional reference case, in which order was sought as in the previous case. The matter was, however, dismissed on the grounds that it lacked merits and held that the complainants had been properly consulted and compensated for their loss. The complainants thus claim that as constitutional reference case could not be appealed, all possible domestic remedies have been exhausted.

60. The African Commission notes that there was a lack of cooperation from the respondent state to submit arguments on the admissibility of the communication despite numerous reminders. In the absence of such a submission, given the face value of the complainants' submission, the African Commission holds that the complaint complies with article 56 of the African Charter and hence declares the communication admissible.

61. In its submission on the merits, the respondent state requested the African Commission to review its decision on admissibility. It argued that even though the African Commission had gone ahead to admit the communication, it would nevertheless, proceed to submit arguments why the African Commission should not be precluded from re-examining the admissibility of the communication, after the oral testimony of the respondent state, and dismissing the communication.

62. In arguing that the African Commission should not be a tribunal of first instance, the respondent state argues that the remedies sought by the complainants in the High Court of Kenya could not be the same as those sought from the African Commission.

63. For the benefit of the African Commission, the respondent state outlined the issues put before the Court in Misc, civil case 183 of 2002:

> (a) A declaration that the land around Lake Baringo is the property of the Endorois community, held in trust for its benefit by the county council of Baringo and the county council of Koibatek, under sections 114 and 115 of the Constitution of Kenya.
>
> (b) A declaration that the county council of Baringo and the county council of Koibatek are in breach of fiduciary duty of trust to the Endorois community, because of their failure to utilise benefits accruing from the game reserve to the benefit of the community contrary to sections 114 and 115 of the Constitution of Kenya.

(c) A declaration that the complainants and the Endorois community are entitled to all the benefits generated through the game reserve exclusively and/or in the alternative the land under the game reserve should revert to the community under the management of trustees appointed by the community to receive and invest the benefits in the interest of the community under section 117 of the Constitution of Kenya.

(d) An award of exemplary damages arising from the breach of the applicants' constitutional rights under section 115 of the Constitution of Kenya.

64. The respondent state informs the African Commission that the court held that procedures governing the setting apart of the game reserve were followed. The respondent state further states that it went further to advise the complainants that they should have exercised their right of appeal under sections 10, 11 and 12 of the trust land Act, Chapter 288, Laws of Kenya, in the event that they felt that the award of compensation was not fairly handled. None of the applicants had appealed, and the High Court was of the view that it was too late to complain.

65. The respondent state also states that the Court opined that the application did not fall under section 84 (enforcement of constitutional rights) since the application did not plead any violations or likelihood of violations of their rights under sections 70 – 83 of the Constitution.

66. It further argues that the communication irregularly came before the African Commission as the applicants did not exhaust local remedies regarding the alleged violations. This is because:

(a) The complainants did not plead that their rights had been contravened or likely to be contravened by the High Court Misc civil case 183 of 2002. It states that the issue of alleged violations of any of the rights claimed under the present communication has, therefore, not been addressed by the local courts. This means that the African Commission will be acting as a court of first instance. The respondent state argues that the applicants should, therefore, be asked to exhaust local remedies before approaching the African Commission.

(b) The complainants did not pursue other administrative remedies available to them. The respondent state argues that the allegations that the Kenyan legal system has no adequate remedies to address the case of the Endorois are untrue and unsubstantiated. It argues that in matters of human rights the Kenya High Court has been willing to apply international human rights instruments to protect the rights of the individual.

67. The respondent state further says that the Kenyan legal system has a very comprehensive description of property rights, and provides for the protection of all forms of property in the Constitution. It argues that while various international human rights instruments, including the African Charter, recognise the right to property, these instruments have a minimalist approach and do not satisfy the kind of property protected. The respondent state asserts that the Kenyan legal system goes further than provided for in international human rights instruments.

68. The respondent state further states that land as property is recognised under the Kenyan legal system and various methods of ownership are recognised and protected. These include private ownership (for natural and artificial persons), communal ownership either through the Land (Group Representatives) Act for adjudicated land, which is also called the group ranches or the trust lands managed by the county council, within whose area of jurisdiction it is situated for the benefit of the persons ordinarily resident on that land. The state avers that the Land Group Act gives effect to such right of ownership, interests or other benefits of the land as may be available, under African customary law.

69. The respondent state concludes that trust lands are established under the Constitution of Kenya and administered under an Act of parliament and that the Constitution provides that trust land may be alienated through:

- Registration to another person other than the county council;
- An Act of parliament providing for the county council to set apart an area of trust land.

70. Rule 118(2) of the African Commission's Rules of Procedure states that:

> If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.

The African Commission notes the arguments advanced by the respondent state to reopen its decision on admissibility. However, after careful consideration of the respondent state's arguments, the African Commission is not convinced that it should reopen arguments on the admissibility of the communication. It therefore declines the respondent state's request.

Submissions on merits

Complainants' submission on the merits

71. The arguments below are the submissions of the complainants, taking also into consideration their oral testimony at the 40th ordinary session, all their written submissions, including letters and supporting affidavits.

72. The complainants argue that the Endorois have always been the *bona fide* owners of the land around Lake Bogoria.[4] They argue that the Endorois' concept of land did not conceive the loss of land without conquest. They argue that as a pastoralist community, the Endorois' concept of 'ownership' of their land has not been one of ownership by paper. The complainants state that the Endorois community have always understood the land in question to be

[4] See above paras 3, 4 and 5 of this communication, where the complainants advance arguments to prove ownership of their land.

'Endorois' land, belonging to the community as a whole and used by it for habitation, cattle, beekeeping, and religious and cultural practices. Other communities would, for instance, ask permission to bring their animals to the area.[5]

73. They also argue that the Endorois have always considered themselves to be a distinct community. They argue that historically the Endorois are a pastoral community, almost solely dependent on livestock. Their practice of pastoralism has consisted of grazing their animals (cattle, goats, sheep) in the lowlands around Lake Bogoria in the rainy season, and turning to the Monchongoi Forest during the dry season. They claim that the Endorois have traditionally relied on beekeeping for honey and that the area surrounding Lake Bogoria is fertile land, providing green pasture and medicinal salt licks, which help raise healthy cattle. They argue that Lake Bogoria is also the centre of the community's religious and traditional practices: around the Lake are found the community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.

74. The complainants argue that the Endorois believe that spirits of all former Endorois, no matter where they are buried, live on in the lake. Annual festivals at the lake took place with the participation of Endorois from the whole region. They say that Monchongoi Forest is considered the birthplace of the Endorois people and the settlement of the first Endorois community. They also state that the Endorois community's leadership is traditionally based on elders. Though under the British colonial administration, chiefs were appointed, this did not continue after Kenyan independence. They state that more recently, the community formed the Endorois Welfare Committee (EWC) to represent its interests. However, the local authorities have refused to register the EWC despite two separate efforts to do so since its creation in 1996.

75. The complainants argue that the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The complainants argue that the African Commission has affirmed the rights of 'peoples' to bring claims under the African Charter in the case of *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria*, (the *Ogoni* case) stating: 'The African Charter in articles 20 through 24 clearly provides for peoples' to retain rights as peoples', that is, as collectives. The importance of community and collective identity in African culture is recognised throughout the African Charter'.[6] They

5 See above paras 3, 4 and 5.

6 *Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria* comm 155/96 (2001) AHRLR 60 (ACHPR 2001) para 40.

further argue that the African Commission noted that when there is a large number of individual victims it may be impractical for each individual complainant to go before domestic courts. In such situations, as was with the *Ogoni* case, the African Commission can adjudicate the rights of a people as a collective. They therefore argue that the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

Alleged violation of article 8 — The right to practice religion

76. Article 8 of the African Charter states:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The complainants allege violation to practice their religion. They claim that the Kenyan authorities' continual refusal to give the community a right of access to religious sites to worship freely amounts to a violation of article 8.

77. The complainants argue that the African Commission has embraced the broad discretion required by international law in defining and protecting religion. In the case of *Free Legal Assistance Group and Others v Zaire*, they argue that the African Commission held that the practices of the Jehovah's Witnesses were protected under article 8.[7] In the present communication, the complainants state that the Endorois' religion and beliefs are protected by article 8 of the African Charter and constitute a religion under international law. The Endorois believe that the great ancestor, *Dorios*, came from the heavens and settled in the Mochongoi Forest. After a period of excess and luxury, the Endorois believe that God became angry and, as punishment, sank the ground one night, forming Lake Bogoria. The Endorois believe themselves to be descendants of the families who survived that event.

78. They state that each season the water of the lake turns red and the hot springs emit a strong odour. At this time, the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the lake. The Endorois regard both Mochongoi Forest and Lake Bogoria as sacred grounds, and have always used these locations for key cultural and religious ceremonies, such as weddings, funerals, circumcisions, and traditional initiations.[8]

79. The complainants argue that the Endorois, as an indigenous group whose religion is intimately tied to the land, require special protection. Lake Bogoria, they argue, is of fundamental religious

7 *Free Legal Assistance Group and Others v Zaire* African Commission on Human and Peoples' Rights comm 25/89, 47/90, 56/91, 100/93 [(2000) AHRLR 74 (ACHPR 1995)] para 45.

8 See World Wildlife Federation Report 18 para 2.2.7.

significance to all Endorois. The religious sites of the Endorois people are situated around the lake, where the Endorois pray, and religious ceremonies are regularly connected with the lake. Ancestors are buried near the lake, and as stated above, they claim that Lake Bogoria is considered the spiritual home of all Endorois, living and dead. The lake, the complainants argue, is therefore essential to the religious practices and beliefs of the Endorois.

80. The complainants argue that by evicting the Endorois from their land, and by refusing the Endorois community access to the Lake and other surrounding religious sites, the Kenyan Authorities have interfered with the Endorois' ability to practice and worship as their faith dictates. In violation of article 8 of the African Charter, the complainants argue that religious sites within the game reserve have not been properly demarcated and protected. They further argue that since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. Access as of right for religious rituals — such as circumcisions, marital rituals, and initiation rights — has been denied the community. Similarly, the Endorois have not been able to hold or participate in their most significant annual religious ritual, which occurs when the lake undergoes seasonal changes.

81. Citing the African Commission's jurisprudence in *Amnesty International v Sudan,* the complainants argue that the African Commission recognised the centrality of practice to religious freedom, noting that the state party violated the authors' right to practice religion because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion.[9] In addition, they argue, the UN declaration on the rights of indigenous peoples gives indigenous peoples the right 'to maintain, protect and have access in privacy to their religious and cultural sites ...'.[10] They state that only through unfettered access will the Endorois be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

82. Citing the case of *Loren Laroye Riebe Star*,[11] the complainants argue that the Inter-American Commission on Human Rights (IAcmHR) has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the above case, the complainants argue that the IAcmHR held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes. They further state that the

9 *Amnesty International and Others v Sudan* comm 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)] (*Amnesty International v Sudan)*.

10 See Draft Declaration on the Rights of Indigenous Peoples UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994) art 13.

11 *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz v Mexico* Inter-American Commission on Human Rights Report No 49/99 case 11.610 (1999).

IAcmHR came to a similar conclusion in *Dianna Ortiz v Guatemala*. This was a case concerning a Catholic nun who fled Guatemala after state actions prevented her from freely exercising her religion.[12] Here, the IAcmHR decided that her right to freely practice her religion had been violated, because she was denied access to the lands most significant to her.[13]

83. The complainants argue that the current management of the game reserve has failed both to fully demarcate the sacred sites within the reserve and to maintain sites that are known to be sacred to the Endorois.[14] They argue that the Kenyan authorities' failure to demarcate and protect religious sites within the game reserve constitutes a severe and permanent interference with the Endorois' right to practice their religion. Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed. They cite the UN Declaration on the Rights of Indigenous Peoples which state in part that: 'states shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.'[15]

84. The complainants also accuse the Kenyan authorities of interfering with the Endorois' right to freely practice their religion by evicting them from their land, and then refusing to grant them free access to their sacred sites. This separation from their land, they argue, prevents the Endorois from carrying out sacred practices central to their religion.

85. They argue that even though article 8 provides that states may interfere with religious practices 'subject to law and order', the Endorois religious practices are not a threat to law and order, and thus there is no justification for the interference. They argue that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. In *Amnesty International v Zambia,* the complainants argue that the African Commission noted that it was 'of the view that the "claw-back" clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter'.[16]

Alleged violation of article 14 — The right to property

Article 14 of the African Charter states:

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12 *Dianna Ortiz . Guatemala* Inter-American Commission on Human Rights Report 31/96, case 10.526 (1997).

13 As above.

14 World Wildlife Federation, Lake Bogoria National Reserve Draft Management Plan, July 2004.

15 Draft Declaration on the Rights of Indigenous Peoples art 13.

16 *Amnesty International v Zambia* communication 212/98 (1999).

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

86. The complainants argue that the Endorois community has a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. They argue that these property rights are derived both from Kenyan law and the African Charter, which recognise indigenous peoples' property rights over their ancestral land. The complainants argue that the Endorois' property rights have been violated by the continuing dispossession of the Lake Bogoria land area. They argue that the impact on the community has been disproportionate to any public need or general community interest.

87. Presenting arguments that article 14 of the Charter has been violated, the complainants argue that for centuries the Endorois have constructed homes, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods around the lake. They argue that in doing so, the Endorois exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title, but was, nevertheless, understood through mutual recognition and respect between landholders. 'Land transactions' would take place only by way of conquest of land.

88. The complainants argue that even under colonial rule when the British crown claimed formal possession of Endorois land, the colonial authorities recognised the Endorois' right to occupy and use the land and its resources. They argue that in law, the land was recognised as the 'Endorois Location' and in practice the Endorois were left largely undisturbed during colonial rule. They aver that the Endorois community continued to hold such traditional rights, interests and benefits in the land surrounding Lake Bogoria even upon the creation of the independent Republic of Kenya in 1963. They state that on 1 May 1963, the Endorois land became 'trust land' under section 115(2) of the Kenyan Constitution, which states:

> Each county council shall hold the trust land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual.

89. They argue that through centuries of living and working on the land, the Endorois were 'ordinarily resident on [the] land', and their traditional form of collective ownership of the land qualifies as a 'right, interest or other benefit ... under African customary law' vested in 'any tribe, group [or] family' for the purposes of section 115(2). They, therefore, argue that as a result, under Kenyan law, the Baringo and Koibatek county councils were — and indeed still are — obligated to give effect to the rights and interests of the Endorois as concerns the land.

Property rights and indigenous communities

90. The complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which include the lack of 'formal' title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. They state that this situation has led to many cases of displacement from a people's historic territory, both by the colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities.

91. In pursuing that line of reasoning, the complainants argue that the African Commission itself has recognised the problems faced by traditional communities in the case of dispossession of their land in a report of the Working Group on Indigenous Populations/Communities, where it states:

> […] their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure.[17]

92. They argue that the jurisprudence of the African Commission notes that article 14 includes the right to property both individually and collectively.

93. Quoting the case of *The Mayagna (Sumo) AwasTingni v Nicaragua*,[18] they argue that indigenous property rights have been legally recognised as being communal property rights, where the Inter-American Court of Human Rights (IACtHR) recognised that the Inter-American Convention protected property rights 'in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property.'[19]

94. The complainants further argue that the courts have addressed violations of indigenous property rights stemming from colonial seizure of land, such as when modern states rely on domestic legal title inherited from colonial authorities. They state that national courts have recognised that right. Such decisions were made by the United Kingdom Privy Council as far back as 1921,[20] the Canadian

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17 Report of the African Commission's Working Group of Experts, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2003).

18 *The AwasTingni Case* (2001) paras 140(b) and 151.

19 As above para 148.

20 See *AmoduTijani v Southern Nigeria* United Kingdom Privy Council, 2 AC 399 (1921).

Supreme Court[21] and the High Court of Australia.[22] Quoting the *Richtersveld* case, they argue that the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British crown and could be held against the current occupiers of their land.[23]

95. They argue that the protection accorded by article 14 of the African Charter includes indigenous property rights, particularly to their ancestral lands. The Endorois' right, they argue, to the historic lands around Lake Bogoria are therefore protected by article 14. They aver that property rights protected go beyond those envisaged under Kenyan law and include a collective right to property.

96. They argue that as a result of the actions of the Kenyan authorities, the Endorois' property has been encroached upon, in particular by the expropriation, and in turn, the effective denial of ownership of their land. They also state that the Kenyan justice system has not provided any protection of the Endorois' property rights. Referring to the High Court of Kenya, they argue that it stated that it could not address the issue of a community's right to property.[24]

97. The complainants argue that the judgment of the Kenyan High Court also stated in effect that the Endorois had lost any rights under the trust, without the need for compensation beyond the minimal amounts actually granted as costs of resettlement for 170 families. They argue that the judgment also denies that the Endorois have rights under the trust, despite being 'ordinarily resident' on the land. The Court, they claimed, stated:

> What is in issue is a national natural resource. The law does not allow individuals to benefit from such a resource simply because they happen to be born close to the natural resource.

98. They argue that in doing so, the High Court dismissed those arguments based not just on the trust, but also on the Endorois' rights to the land as a 'people' and as a result of their historic occupation of Lake Bogoria.

99. The complainants cite a number of encroachments, they claim, that go to the core of the community's identity as a 'people', including:

> (a) the failure to provide adequate recognition and protection in domestic law of the community's rights over the land, in particular the failure of Kenyan law to acknowledge collective ownership of land;

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21 *Calder et al v Attorney-General of British Columbia* Supreme Court of Canada 34 DLR (3d) 145 (1973).

22 *Mabo v Queensland* High Court of Australia 107 ALR 1 (1992).

23 *Alexkor Ltd v Richtersveld Community,* Constitutional Court of South Africa, CCT 19/03 (2003).

24 See above para 12.

(b) the declaration of the game reserve in 1973/74, which purported to remove the community's remaining property rights over the land, including its rights as beneficiary of a trust under Kenyan law;

(c) the lack of and full compensation to the Endorois community for the loss of their ability to use and benefit from their property in the years after 1974;

(d) the eviction of the Endorois from their land, both in the physical removal of Endorois families living on the land and the denial of the land to the rest of the Endorois community, and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives;

(e) the significant loss by the Endorois of cattle as a result of the eviction;

(f) the denial of benefit, use of and interests in their traditional land since eviction, including the denial of any financial benefit from the lands resources, such as that generated by tourism;

(g) the awarding of land title to private individuals and the awarding of mining concessions on the disputed land.

100. The complainants argue that an encroachment upon property will constitute a violation of article 14, unless it is shown that it is in the general or public interest of the community and in accordance with the provisions of appropriate laws. They further argue that the test laid out in article 14 of the Charter is *conjunctive,* that is, in order for an encroachment not to be in violation of article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws and must be proportional. Quoting the Commission's own case law, the complainants argue that: '(t)he justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow'.[25] They argue that both the European Court of Human Rights[26] and the IAcmHR have held that limitations on rights must be 'proportionate and reasonable'.[27]

101. They argue that in the present communication, in the name of creating a game reserve, the Kenyan authorities have removed the Endorois from their land, and destroyed their possessions, including houses, religious constructions, and beehives. They argue that the upheaval and displacement of an entire community and denial of their property rights over their ancestral lands are disproportionate to any public need served by the game reserve. They state that even assuming that the creation of the game reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need.

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25 *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* (1999) communications 140/94, 141/94, 145/95 [(2000) AHRLR 227 (ACHPR 1999)] para 42 (*Constitutional Rights Project* case).

26 *Handyside v United* Kingdom application 5493/72 (1976) Series A.24 (7 December) para 49.

27 *X & Y v Argentina* (1996) report 38/96, case 10.506 (15 October) para 60.

102. They further argue that the encroachment on to Endorois property rights must be carried out in accordance with 'appropriate laws' in order to avoid a violation of article 14, and that this provision must, at the minimum mean that both Kenyan law and the relevant provisions of international law were respected. They argue that the violation of the Endorois' rights failed to respect Kenyan law on at least three levels: (i) there was no power to expel them from the land; (ii) the trust in their favour was never legally extinguished, but simply ignored; and (iii) adequate compensation was never paid.

103. The complainants state that the traditional land of the Endorois is classified as trust land under section 115 of the Constitution, and that this obliges the county council to give effect to 'such rights, interests or other benefits in respect of the land as may under the African customary law, for the time being in force'. They argue that it created a beneficial right for the Endorois over their ancestral land.

104. They further argue that the Kenyan Authorities created the Lake Hannington game reserve, including the Endorois indigenous land, on 9 November 1973, but changed the name to Lake Bogoria game reserve in a second notice in 1974.[28] The 1974 'notice' was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).[29] WAPA, the complainants informs the African Commission, applied to trust land as it did to any other land, and did not require that the land be taken out of the trust before a game reserve could be declared over that land. They argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a game reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the game reserve.[30] Yet, the complainants argue, despite a lack of legal justification, the Endorois community were informed from 1973 onwards that they would have to leave their ancestral lands.

105. Moreover, they argue, the declaration of the Lake Bogoria game reserve by way of the 1974 notice did not affect the status of the Endorois' land as trust land. The obligation of Baringo and Koibatek county councils to give effect to the rights and interests of the Endorois community continued. They state that the only way under Kenyan law in which the Endorois benefits under the trust could

[28] They state that pursuant to Kenyan law, the authorities published Notice 239/1973 in the Kenya Reserve to declare the creation of 'Lake Hannington game reserve'. Gazette Notice 270/1974 was published to revoke the earlier notice and changed the name of the game reserve on 12 October 1974: 'the area set forth in the schedule hereto to be a game reserve known as Lake Bogoria game reserve.'

[29] The complainants state that sec 3(2) of WAPA was subsequently revoked on 13 February 1976 by S.68 of the Wildlife Conservation and Management Act.

[30] The complainants argue that sec 3(20) of WAPA did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

have been dissolved is through the county council or the President of Kenya having to 'set apart' the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.[31]

106. The complainants argue that as far as the community is aware, no such notice was published. Until this is done, they argue, trust land encompassing Lake Bogoria cannot have been set apart and the African customary law rights of the Endorois people continue under Kenyan law.[32] They state that the Kenyan High Court failed to protect the Endorois' rights under the trust to a beneficial property right, and the instruction given to the Endorois to leave their ancestral lands was also not authorised by Kenyan law.

107. They conclude that as a result, the Kenyan authorities have acted in breach of trust and not in 'accordance with the provisions of the law' for the purposes of article 14 of the Charter.

108. They further argue that even if Endorois land had been set apart, Kenyan law still requires the compensation of residents of lands that are set apart; that the Kenyan Constitution states that where trust land is set apart, the government must ensure:

> [T]he prompt payment of full compensation to any resident of the land set apart who — (a) under the African customary law for the time being in force and applicable to the land, has a right to occupy any part of the land.[33]

109. Citing Kenyan law, the complainants argue that the Kenyan Land Acquisition Act outlines factors that should be considered in determining the compensation to be paid,[34] starting with the basic principle that compensation should be based on the market value of the land at the time of the acquisition. Other considerations include: damages to the interested person caused by the removal from the land and other damages including lost earnings, relocation expenses and any diminution of profits of the land. The Land Acquisition Act provides for an additional 15% of the market value to be added to compensate for disturbances. Under Kenyan law if a court finds the amount of compensation to be insufficient, 6% interest per year must be paid on the difference owed to the interested parties.[35]

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31 The complainants argue that the process of such a 'setting apart' of trust land under sec 117 or sec 118 of the Constitution are laid down by the Kenyan trust land Act. They state that publication is required by s 13(3) and (4) of the trust land Act in respect of s1 17 Constitution, and by sec 7(1) and (4) of the Trust land Act in respect of sec 118 Constitution.

32 They also argue that recently the area has been referred to as Lake Bogoria National Reserve. Even if there has been a legal change in title, this still would not mean that the Endorois' trust has been ended under Kenyan law without the 'setting aside'.

33 Constitution of the state of Kenya sec 117(4).

34 Land Acquisition Act, 'Principles on which Compensation is to be determined'.

35 See Kenya Land Acquisition Act Part IV para 29(3).

110. They state that only 170 families of at least 400 families forced to leave Endorois traditional land by the Kenyan authorities have received some form of monetary assistance. In 1986, 170 families evicted in late 1973 from their homes within the Lake Bogoria game reserve, each received around 3,150 Kshs. At the time, this was equivalent to approximately £30.

111. They state that further amounts in compensation for the value of the land lost, together with revenue and employment opportunities from the game reserve, were promised by the Kenyan authorities, but these have never been received by the community.

112. They argue that the respondent state has itself recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and did not constitute full compensation for loss of land. The complainants argue that international law also lays down strict requirements for compensation in the case of expropriation of property.[36] They argue that the fact that such payment was made some 13 years after the first eviction, and that it does not represent the market value of the land gazetted as Lake Bogoria game reserve, means that the respondent state would not have paid 'prompt, full compensation' as required by the Constitution on the setting apart of the trust land. Therefore Kenyan law has not been complied with. Moreover, the complainants argue, the fact that members of the Endorois community accepted the very limited monetary compensation does not mean that they accepted this as full compensation, or indeed that they accepted the loss of their land. They state that *even if* the respondent state had formally set apart the trust land by way of Gazette notice, the test of 'in accordance with the provisions of law' required by article 14 of the Charter would not have been satisfied, due to the payment of inadequate compensation.

113. The complainants argue that the requirement that any encroachment on property rights be in accordance with the 'appropriate laws' must also include relevant international laws. They argue that the respondent state, including the courts, has failed to apply international law on the protection of indigenous land rights, which includes the need to recognise the collective nature of land rights, to recognise historic association, and to prioritise the cultural and spiritual and other links of the people to a particular territory. Instead, Kenyan law gives only limited acknowledgement to African

[36] The complainants argue that in the European Court of Human Rights, for instance, compensation must be fair compensation, and the amount and timing of payment is material to whether a violation of the right to property is found. They cite the case of *Katikaridis and Others v Greece* European Court of Human Rights, case 72/1995/578/664 (1996). The complainants also cite article 23(2) of the American Convention on Human Rights which provides that 'no-one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'

customary law. The trust land system in Kenya provides in reality only minimal rights, as a trust (and therefore African customary law rights, such as those of the Endorois) can be extinguished by a simple decision of the executive. They argue that the crucial issue of recognition of the collective ownership of land by the Endorois is not acknowledged at all in Kenyan law, as is clearly shown by the High Court judgment. Encroachment on the Endorois' property did not therefore comply with the appropriate international laws on indigenous peoples' rights. They state that the Endorois have also suffered significant property loss as a result of their displacement as detailed above, including the loss of cattle, and that the only 'compensation' received was the eventual provision of two cattle dips, which does not compensate for the loss of the salt licks around the lake or the substantial loss of traditional lands.

114. They conclude that the fact that international standards on indigenous land rights and compensation were not met, as well as that provisions of Kenyan law were ignored, means that the encroachment upon the property of the Endorois community was not in accordance with the 'appropriate laws' for the purposes of article 14 of the Charter.

Alleged violations of article 17(2) and (3) — The right to culture

Article 17(2) and (3) states that:

> (2) Every individual may freely take part in the cultural life of his community.
>
> (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.

115. The complainants argue that the Endorois community's cultural rights have been violated as a result of the creation of a game reserve. By restricting access to Lake Bogoria, the Kenyan authorities have denied the community access to a central element of Endorois cultural practice. After defining culture to mean the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups,[37] they argue that the protection of article 17 can be invoked by any group that identifies with a particular culture within a state. But they argue that it does more than that. They argue that article 17 extends to the protection of indigenous cultures and ways of life.

116. They argue that the Endorois have suffered violations of their cultural rights on two counts. In the first instance, the community has

[37] The complainants refer to Rodolfo Stavenhagen (2001), 'Cultural rights: A social science, perspective', in Asbjørn Eide *et al* eds *Economic, Social and Cultural Rights* 2nd ed 85, 86-88. see also Rachel Murray and Steven Wheatley (2003) 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, vol 25, 222.

faced systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations. The community's attempts to access their historic land for these purposes was described as 'trespassing' and met with intimidation and detention. Secondly, and separately, the cultural rights of the community have been violated by the serious damage caused by the Kenyan authorities to their pastoralist way of life.

117. With mining concessions now underway in proximity to Lake Bogoria, the complainants argue that further threat is posed to the cultural and spiritual integrity of the ancestral land of the Endorois.

118. They also argue that unlike articles 8 and 14 of the African Charter, article 17 does not have an express clause allowing restrictions on the right under certain circumstances. They state that the absence of such a clause is a strong indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. However, if there is any restriction, the restriction must be proportionate to a legitimate aim and in line with principles of international law on human and peoples' rights. The complainants argue that the principle of proportionality requires that limitations be the least restrictive possible to meet the legitimate aim.

119. The complainants thus argue that even if the creation of the game reserve constitutes a legitimate aim, the respondent state's failure to secure access by right for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim.

Alleged violation of article 21 — rights to free disposition of natural resources

Article 21 of the Charter states that:

> (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

120. The complainants argue that the Endorois community are unable to access the vital resources in the Lake Bogoria region since their eviction from the game reserve. The medicinal salt licks and fertile soil that kept the community's cattle healthy are now out of the community's reach. Mining concessions to Endorois land have been granted without giving the Endorois a share in these resources. Consequently, the Endorois suffer a violation of article 21: Right to natural resources.

121. They argue that in the *Ogoni* case the right to natural resources contained within their traditional land was vested in the indigenous people and that a people inhabiting a specific region within a state

can claim the protection of article 21.[38] They argue that the right to freely dispose of natural resources is of crucial importance to indigenous peoples and their way of life. They quote from the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities which states:

> Dispossession of land and natural resources is a major human rights problem for indigenous peoples ... The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them ... This [the loss of fundamental natural resources] is a serious violation of the African Charter (article 21(1) and 21(2)), which states clearly that all peoples have the right to natural resources, wealth and property.[39]

122. Citing the African Charter, the complainants argue that the Charter creates two distinct rights to both property (article 14) and the free disposal of wealth and natural resources (article 21). They argue that in the context of traditional land, the two rights are very closely linked and violated in similar ways. They state that article 21 of the African Charter is, however, wider in its scope than article 14, and requires respect for a people's right to use natural resources, even where a people does not have title to the land.

123. The complainants point out that the World Bank's Operational Directive 4.10 states that: 'Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.'[40]

124. They state that the Endorois as a people enjoy the protection of article 21 with respect to Lake Bogoria and the wealth and natural resources arising from it. They argue that for the Endorois, the natural resources include traditional medicines made from herbs found around the lake and the resources, such as salt licks and fertile soil, which provided support for their cattle and therefore their pastoralist way of life. These, the complainants argue, were natural resources from which the community benefited before their eviction from their traditional land. In addition, article 21 also protects the right of the community to the potential wealth of their land, including tourism, rubies, and other possible resources. They state that since their eviction from Lake Bogoria, the Endorois, in violation of article 21, have been denied unhindered access to the land and its natural resources, as they can no longer benefit from the natural resources and potential wealth, including that generated by recent exploitation of the land, such as the revenues and employment created by the game reserve and the product of mining operations.

38 The *Ogoni* case paras 56-58.
39 Report of the African Commission's Working Group of Experts p 20.
40 World Bank Operational Directive 4.10.

Alleged violation of article 22 — The right to development

125. Article 22 of the African Charter states that:

> All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

On the issue of the right to development, the complainants argue that the Endorois' right to development has been violated as a result of the respondent state's failure to adequately involve the Endorois in the development process and the failure to ensure the continued improvement of the Endorois community's well-being.

126. The complainants argue that the Endorois have seen the set of choices and capabilities open to them shrink since their eviction from the game reserve. They argue that due to the lack of access to the lake, the salt licks and their usual pasture, the cattle of the Endorois died in large numbers. Consequently, they were not able to pay their taxes and, as a result, the Kenyan authorities took away more cattle.

127. They stress the point that the Endorois had no choice but to leave the lake. They argue that this lack of choice for the community directly contradicts the guarantees of the right to development. They state that if the Kenyan authorities had been providing the right to development as promised by the African Charter, the development of the game reserve would have increased the capabilities of the Endorois.

128. Citing the *Ogoni* case, the complainants argue that the African Commission has noted the importance of choice to well-being. They state that the African Commission noted that the state must respect rights holders and the 'liberty of their action'.[41] They argue that the liberty recognised by the Commission is tantamount to the choice embodied in the right to development. By recognising such liberty, they argue, the African Commission has started to embrace the right to development as a choice. Elaborating further on the right to development, they argue that the same 'liberty of action' principle can be applied to the Endorois community in the instant communication.

129. They argue that choice and self-determination also include the ability to dispose of natural resources as a community wishes, thereby requiring a measure of control over the land. They further argue that for the Endorois, the ability to use the salt licks, water, and soil of the Lake Bogoria area has been eliminated, undermining this partner (the Endorois community) of self-determination. In that regard, the complainants argue, it is clear that development should be understood as an increase in peoples' well-being, as measured by capacities and choices available. The realisation of the right to development, they say, requires the improvement and increase in

41 *Ogoni* case para 46.

capacities and choices. They argue that the Endorois have suffered a loss of well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.

130. Citing the Human Rights Committee (HRC), they argue that the HRC addressed the effectiveness of consultation procedures in *Apirana Mahuika* v *New Zealand*.[42] The complainants argue that the HRC found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the Maori people in determining fishing rights. The New Zealand authorities had negotiated with Maori representatives and then allowed the resulting memorandum of understanding to be debated extensively by Maoris throughout the country.[43] The complainants argue that the HRC specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the Maori people, and that the Maori representatives were able to affect the terms of the final settlement.

131. The inadequacy of the consultations undertaken by the Kenyan authorities, the complainants argue, is underscored by Endorois actions after the creation of the game reserve. The complainants inform the African Commission that the Endorois believed, and continue to believe even after their eviction, that the game reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry into their land. They assert that in failing to understand the reasons for their permanent eviction, many families did not leave the location until 1986.

132. They argue that the course of action left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. They state that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained.

133. They further say that the requirement of prior, informed consent has also been delineated in the case law of the IAcmHR. Referring the African Commission to the case of *Mary and Carrie Dan v USA*, they argue that the IAcmHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.[44] They

[42] *Apirana Mahuika et al v New Zealand,* Human Rights Committee, communication 547/1993, UN Doc CCPR/C/70/D/547/1993 (2000) paras 5.7-5.9.

[43] As above.

[44] *Mary and Carrie Dann v USA* (2002), para 136.

state that to have a process of consent that is fully informed 'requires at a minimum that *all* of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives'.[45]

134. The complainants are also of the view that the respondent state violated the Endorois' right to development by engaging in coercive and intimidating activity that has abrogated the community's right to meaningful participation and freely given consent. They state that such coercion has continued to the present day. The complainants say that Mr Charles Kamuren, the Chairperson of the Endorois Welfare Council, had informed the African Commission of details of threats and harassment he and his family and other members of the community have received, especially when they objected to the issue of the granting of mining concessions.

135. The complainants further argue that the Endorois have been excluded from participating or sharing in the benefits of development. They argue that the respondent state did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the right to development through adequate and prior consultation. They assert that the Endorois' development as a people has suffered economically, socially and culturally. They further conclude that the Endorois community suffered a violation of article 22 of the Charter.

Respondent state submissions on merits

136. In response to the brief submitted by the complainants on the merits including the *amicus curiae* brief by COHRE, the respondent state, the Republic of Kenya, submitted its reply on the merits of the communication to the African Commission.

137. The arguments below are the submissions of the respondent state , taking into consideration their oral testimony at the 40th ordinary session of the African Commission, all their written submissions, including letters, supporting affidavits, video evidence and the 'respondents submissions and further clarifications arising out of the questions by the Commissioner during the merits hearing of the communication'.

138. The respondent state argues that most of the tribes do not reside in their ancestral lands owing to movements made due to a

[45] See above at para 140. Antoanella-Iulia Motoc and the Tebtebba Foundation, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept*. UN Doc E/CN.4/Sub.2/AC.4/2004/4 (2004), para 14(a).

number of factors, including search for pastures for their livestock; search for arable land to carry out agriculture; relocation by government to facilitate development; creation of irrigation schemes, national parks, game reserves, forests and extraction of natural resources, such as minerals.

139. The respondent state argues that it has instituted a programme for universal free primary education and an agricultural recovery programme, which aims at increasing the household income of the rural poor, including the Endorois. It states that it has not only initiated programmes for the equitable distribution of budgetary resources, but has also formulated an economic recovery strategy for wealth and employment creation, which seeks to eradicate poverty and secure the economic and social rights of the poor and the marginalised, including the Endorois.

140. The respondent state argues that the land around the Lake Bogoria area is occupied by the Tugen tribe, which comprises four clans:

141. The Endorois — who have settled around Mangot, Mochongoi and Tangulmbei; the Lebus — who have settled around Koibatek District; the Somor — who live around Maringati, Sacho, Tenges and Kakarnet and the Alor — living around Kaborchayo, Paratapwa, Kipsalalar and Buluwesa.

142. The respondent state argues that all the clans co-exist in one geographical area. It states that it is noteworthy that they all share the same language and names, which means that they have a lot in common. The respondent state disputes that the Endorois are indeed a community/sub-tribe or clan on their own, and it argues that it is incumbent on the complainants to prove that the Endorois are distinct from the other Tugen sub-tribe or indeed the larger Kalenjin tribe before they can proceed to make a case before the African Commission.

143. The respondent state maintains that following the declaration of the Lake Bogoria game reserve, the government embarked on a re-settlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme. It argues that this was over and above the compensation paid to the Endorois after their ancestral land around the lake was gazetted. It further states that there is no such thing as *Mochongoi Forest in Kenya* and the only forest in the area is Ol Arabel Forest.

Decision on merits

144. The present communication alleges that the respondent state has violated the human rights of the Endorois community, an indigenous people, by forcibly removing them from their ancestral land, the failure to adequately compensate them for the loss of their

property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.

145. Before addressing the articles alleged to have been violated, the respondent state has requested the African Commission to determine whether the Endorois can be recognised as a 'community'/ sub-tribe or clan on their own. The respondent state disputes that the Endorois are a distinct community in need of special protection. The respondent state argues that the complainants need to prove this distinction from the Tugen sub-tribe or indeed the larger Kalenjin tribe. The immediate questions that the African Commission needs to address itself to are:

146. Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection? If they are a distinct community, what makes them different from the Tugen sub-tribe or indeed the larger Kalenjin tribe?

147. Before responding to the above questions, the African Commission notes that the concepts of 'peoples' and 'indigenous peoples/communities' are contested terms.[46] As far as 'indigenous peoples' are concerned, there is no universal and unambiguous definition of the concept, since no single accepted definition captures the diversity of indigenous cultures, histories and current circumstances. The relationships between indigenous peoples and dominant or mainstream groups in society vary from country to country. The same is true of the concept of 'peoples'. The African Commission is thus aware of the political connotation that these concepts carry. Those controversies led the drafters of the African Charter to deliberately refrain from proposing any definitions for the notion of 'people(s)'.[47] In its report of the Working Group of Experts on Indigenous Populations/Communities,[48] the African Commission describes its dilemma of defining the concept of 'peoples' in the following terms:

> Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the (CESCR) do not define 'peoples.' It is evident that the drafters of the African Charter intended to distinguish between the traditional individual rights where the sections preceding

[46] See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People on Implementation of General Assembly Resolution 60/251 of 15 March 2006, A/HRC/4/32/ Add.3, 26 February 2007: Mission to Kenya from 4 to 14 December 2006, at p 9.

[47] See the Report of the Rapporteur of the OAU ministerial meeting on the draft African Charter on Human and Peoples' Rights held in Banjul, The Gambia, from 9 to 15 June 1980 (CAB/LEG/67/3/Draft Rapt. Rpt (II)), p 4.

[48] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, published jointly by the ACHPR/IWGIA 2005.

article 17 make reference to 'every individual', article 18 serves as a break by referring to the family. Articles 19 to 24 make specific reference to 'all peoples'.

148. The African Commission, nevertheless, notes that while the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

149. The African Commission also notes that normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'.[49] It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three 'generations' of rights: civil and political rights; economic, social, and cultural rights; and group and peoples' rights. In that regard, the African Commission notes its own observation that the term indigenous' is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/ Communities of the African Commission.[50] In the context of the African Charter, the Working Group notes that the notion of 'peoples' is closely related to collective rights.[51]

150. The African Commission also notes that the African Charter, in articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives.[52] The African Commission through its

[49] The African Charter is not an accident of history. Its creation by the OAU came at a time of increased scrutiny of states for their human rights practices, and the ascendancy of human rights as a legitimate subject of international discourse. For African states, the rhetoric of human rights had a special resonance for several reasons, including the fact that post-colonial African states were born out of the anti-colonial human rights struggle, a fight for political and economic self-determination and the need to reclaim international legitimacy and salvage its image.

[50] Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *supra* n 47.

[51] Ibid.

[52] See *The Social and Economic Rights Action Centre for Economic and Social Rights v Nigeria* (*SERAC and CESR*) or *The Ogoni case 2001*. African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights — Nigeria (27 May 2002), *Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights*, 2001-2002.

Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.[53] These are: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. The Working Group also demarcated some of the shared characteristics of African indigenous groups:

> ... first and foremost (but not exclusively) different groups of hunter-gatherers or former hunter-gatherers and certain groups of pastoralists. ... A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.[54]

151. The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as 'peoples', *viz*: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy — especially rights enumerated under articles 19 to 24 of the African Charter — or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.[55]

152. As far as the present matter is concerned, the African Commission is also enjoined under article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter.[56] It takes note of the working definition proposed by the UN Working Group on Indigenous Populations:

> ... that indigenous peoples are ... those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[57]

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53 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth session, 2003).

54 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth session, 2003).

55 Ibid.

56 See art 60 of the African Charter.

57 Jose Martinez Cobo (1986), Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations*, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc E/CN.4/Sub.2/1986/7/Add.4.

153. But this working definition should be read in conjunction with the 2003 report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, which is the basis of its 'definition' of indigenous populations.[58] Similarly it notes that the International Labour Organisation has proffered a definition of indigenous peoples in Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries:[59]

> Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[60]

154. The African Commission is also aware that though some indigenous populations might be first inhabitants, validation of rights is not automatically afforded to such pre-invasion and pre-colonial claims. In terms of ILO Convention 169, even though many African countries have not signed and ratified the said Convention, and like the UN Working Groups' conceptualisation of the term, the African Commission notes that there is a common thread that runs through all the various criteria that attempts to describe indigenous peoples — that indigenous peoples have an unambiguous relationship to a distinct territory and that all attempts to define the concept recognise the linkages between people, their land, and culture. In that regard, the African Commission notes the observation of the UN Special Rapporteur, where he states that in Kenya indigenous populations/communities include pastoralist communities such as the *Endorois*,[61] Borana, Gabra, Masai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku. The UN Special Rapporteur further observed that the Endorois community have lived for centuries in their traditional territory around Lake Bogoria, which was declared a wildlife sanctuary in 1973.[62]

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58 The UN Working Group widens the analysis beyond the African historical experience and also raises the slightly controversial issue of 'first or original occupant' of territory, which is not always relevant to Africa.

59 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), 72 ILO Official Bull 59, entered into force Sept. 5, 1991, art 1(1)(b).

60 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No 169), 72 ILO Official Bull 59, entered into force Sept. 5, 1991, art 1(1)(b).

61 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op cit*, *supra* n 47 - Emphasis added.

62 See Report of the Special Rapporteur (Rodolfo Stavenhagen) on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *op. cit*, *supra* n 47.

155. In the present communication the African Commission wishes to emphasise that the Charter recognises the rights of peoples.[63] The complainants argue that the Endorois are a people, a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The respondent state disagrees.[64] The African Commission notes that the Constitution of Kenya, though incorporating the principle of non-discrimination and guaranteeing civil and political rights, does not recognise economic, social and cultural rights as such, as well as group rights. It further notes that the rights of indigenous pastoralist and hunter-gatherer communities are not recognized as such in Kenya's constitutional and legal framework, and no policies or governmental institutions deal directly with indigenous issues. It also notes that while Kenya has ratified most international human rights treaties and conventions, it has not ratified ILO Convention No 169 on Indigenous and Tribal Peoples in Independent Countries, and it has withheld its approval of the United Nations Declaration on the Rights of Indigenous Peoples of the General Assembly.

156. After studying all the submissions of the complainants and the respondent state, the African Commission is of the view that Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands — Lake Bogoria and the surrounding area. It agrees that Lake Bogoria and the Monchongoi Forest are central to the Endorois' way of life and without access to their ancestral land, the Endorois are unable to fully exercise their cultural and religious rights, and feel disconnected from their land and ancestors.

157. In addition to a sacred relationship to their land, self-identification is another important criterion for determining indigenous peoples.[65] The UN Special Rapporteur on the rights and fundamental freedoms of indigenous people also supports self-identification as a key criterion for determining who is indeed indigenous.[66] The African Commission is aware that today many

63 The Commission has affirmed the right of peoples to bring claims under the African Charter. See the case of *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*. Here the Commission stated: 'The African Charter, in its articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives.'

64 The Commission has also noted that where there is a large number of victims, it may be impractical for each individual complainant to go before domestic courts. In such situations, as in the *Ogoni case,* the Commission can adjudicate the rights of a people as a collective. Therefore, the Endorois, as a people, are entitled to bring their claims collectively under those relevant provisions of the African Charter.

65 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (adopted at the Twenty-eighth session, 2003).

66 See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Commission on Human Rights, UN Doc E/CN.4/2002/97, (2002) at para 53.

indigenous peoples are still excluded from society and often even deprived of their rights as equal citizens of a state. Nevertheless, many of these communities are determined to preserve, develop and transmit to future generations their ancestral territories and their ethnic identity. It accepts the arguments that the continued existence of indigenous communities as 'peoples' is closely connected to the possibility of them influencing their own fate and to living in accordance with their own cultural patterns, social institutions and religious systems.[67] The African Commission further notes that the report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (WGIP) emphasises that peoples' self-identification is an important ingredient to the concept of peoples' rights as laid out in the Charter. It agrees that the alleged violations of the African Charter by the respondent state are those that go to the heart of indigenous rights — the right to preserve one's identity through identification with ancestral lands, cultural patterns, social institutions and religious systems. The African Commission, therefore, accepts that self-identification for Endorois as indigenous individuals and acceptance as such by the group is an essential component of their sense of identity.[68]

158. Furthermore, in drawing inspiration from international law on human and peoples' rights, the African Commission notes that the IACtHR has dealt with cases of self-identification where Afro-descendent communities were living in a collective manner, and had, for over 2-3 centuries, developed an ancestral link to their land. Moreover, the way of life of these communities depended heavily on the traditional use of their land, as did their cultural and spiritual survival due to the existence of ancestral graves on these lands.[69]

159. The African Commission notes that while it has already accepted the existence of indigenous peoples in Africa through its WGIP reports, and through the adoption of its advisory opinion on the UN Declaration on the Rights of Indigenous Peoples, it notes the fact that the IACtHR has not hesitated in granting the collective rights protection to groups beyond the 'narrow/aboriginal/pre-Colombian' understanding of indigenous peoples traditionally adopted in the Americas. In that regard, the African Commission notes two relevant

[67] See also Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth session, 1990), UN Doc A/45/18 at 79 (1991). 'The Committee', in General Recommendation VIII stated that membership in a group, 'shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'.

[68] See Rodolfo Stavenhagen (2002), *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People,* UN Commission on Human Rights, UN Doc E/CN.4/2002/97, (2002) at para 100, where he argues that self-identification is a key criterion for determining who is indeed indigenous.

[69] Op cit *infra* n 71.

decisions from the IACtHR: *Moiwana v Suriname*[70] and *Saramaka v Suriname*. The *Saramaka* case is of particular relevance to the Endorois case, given the views expressed by the respondent state during the oral hearings on the merits.[71]

160. In the *Saramaka* case, according to the evidence submitted by the complainants, the Saramaka people are one of six distinct Maroon groups in Suriname whose ancestors were African slaves forcibly taken to Suriname during the European colonisation in the 17th century. The IACtHR considered that the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly because of their special relationship with their ancestral territories, and because they regulate themselves, at least partially, by their own norms, customs, and/or traditions.

161. Like the state of Suriname, the respondent state (Kenya) in the instant communication is arguing that the inclusion of the Endorois in 'modern society' has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct group that is very different from the Tugen sub-tribe or indeed the larger Kalenjin tribe. That is, the respondent state is questioning whether the Endorois can be defined in a way that takes into account the different degrees to which various members of the Endorois community adhere to traditional laws, customs, and economy, particularly those living

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70 See *Moiwana Village v Suriname*, Judgment of June 15, 2005. Series C No 124, paras 85 and 134-135. On 29 November 1986, the Suriname army attacked the N'djuka Maroon village of Moiwana and massacred over 40 men, women and children, and razed the village to the ground. Those who escaped the attack fled into the surrounding forest, and then into exile or internal displacement. On 12 November 1987, almost a year later, Suriname simultaneously ratified the American Convention on Human Rights and recognized the jurisdiction of the Inter-American Court of Human Rights (IACtHR). Almost ten years later, on 27 June 1997, a petition was filed with the Inter-American Commission on Human Rights (IACmHR) and later on lodged with the IACtHR. The Commission stated that, while the attack itself predated Suriname's ratification of the American Convention and its recognition of the Court's jurisdiction, the alleged denial of justice and displacement of the Moiwana community occurring subsequent to the attack comprise the subject matter of the application. In this case the IACtHR recognised collective land rights, despite being an Afro-descendent community (ie not a traditional pre-Colombian/'autochtonous' understanding of indigenousness in the Americas).

71 The respondent state during the oral hearings at the 40th ordinary session in Banjul, The Gambia, stated that: (a) the Endorois do not deserve special treatment since they are no different from the other Tungen sub-group, and that (b) inclusion of some of the members of the Endorois in 'modern society' has affected their cultural distinctiveness, such that it would be difficult to define them as a distinct legal personality (c) representation of the Endorois by the Endorois Welfare Council is allegedly not legitimate. See Inter-American Commission on Human Rights (IACHmR), Report No 9/06 *The Twelve Saramaka Clans (Los) v Suriname* (March 2, 2006); Inter-American Court of Human Rights (IACtHR), *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007) at paras 80-84.

within the Lake Bogoria area. In the *Saramaka* case, the IACtHR disagreed with the state of Suriname that the Saramaka could not be considered a distinct group of people just because a few members do not identify with the larger group. In the instant case, the African Commission, from all the evidence submitted to it, is satisfied that the Endorois can be defined as a distinct tribal group whose members enjoy and exercise certain rights, such as the right to property, in a distinctly collective manner from the Tugen sub-tribe or indeed the larger Kalenjin tribe.

162. The IACtHR also noted that the fact that some individual members of the Saramaka community may live outside of the traditional Saramaka territory and in a way that may differ from other Saramakas who live within the traditional territory and in accordance with Saramaka customs does not affect the distinctiveness of this tribal group, nor its communal use and enjoyment of their property. In the case of the Endorois, the African Commission is of the view that the question of whether certain members of the community may assert certain communal rights on behalf of the group is a question that must be resolved by the Endorois themselves in accordance with their own traditional customs and norms and not by the state. The Endorois cannot be denied a right to juridical personality just because there is a lack of individual identification with the traditions and laws of the Endorois by some members of the community.

> From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of 'distinctiveness.' The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a 'people', a status that entitles them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights — the right to preserve one's identity through identification with ancestral lands.

Alleged violation of article 8

163. The complainants allege that Endorois' right to freely practice their religion has been violated by the respondent state's action of evicting the Endorois from their land, and refusing them access to Lake Bogoria and other surrounding religious sites. They further allege that the respondent state 's has interfered with the Endorois' ability to practice and worship as their faith dictates; that religious sites within the game reserve have not been properly demarcated and protected and since their eviction from the Lake Bogoria area, the Endorois have not been able to freely practice their religion. They claim that access as of right for religious rituals — such as circumcisions, marital rituals, and initiation rights — have been denied to the community. Similarly, they state that the Endorois have not been able to hold or participate in their most significant annual

religious ritual, which occurs when the lake undergoes seasonal changes.

164. The complainants further argue that the Endorois have neither been able to practice the prayers and ceremonies that are intimately connected to the lake, nor have they been able to freely visit the spiritual home of all Endorois, living and dead. They argue that the Endorois' spiritual beliefs and ceremonial practices constitute a religion under international law. They point out that the term 'religion' in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. They argue that the HRC states that the right to freedom of religion in the ICCPR:

> protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.[72]

To rebut the allegation of a violation of article 8 of the African Charter, the respondent state argues that the complainants have failed to show that the action of the government to gazette the game reserve for purposes of conserving the environment and wildlife and to a great extent the complainants' cultural grounds fails the test of the constitution of reasonableness and justifiability. It argues that through the gazetting of various areas as protected areas, national parks or game reserves or falling under the national museums, it has been possible to conserve some of the areas which are threatened by encroachment due to modernisation. The respondent state argues that some of these areas include '(k)ayas' (forests used as religious ritual grounds by communities from the coast province of Kenya) which has been highly effective while the communities have continued to access these grounds without fear of encroachment.

165. Before deciding whether the respondent state has indeed violated article 8 of the Charter, the Commission wishes to establish whether the Endorois' spiritual beliefs and ceremonial practices constitute a religion under the African Charter and international law. In that regard, the African Commission notes the observation of the HRC in paragraph 164 (above). It is of the view that freedom of conscience and religion should, among other things, mean the right to worship, engage in rituals, observe days of rest, and wear religious garb.[73] The African Commission notes its own observation in *Free Legal Assistance Group v Zaire*, that it has held that the right to freedom of conscience allows for individuals or groups to worship or

[72] Human Rights Committee, General Comment 22, article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\ GEN\1\ Rev.1 (1994), 35.

[73] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Thirty-sixth session, 1981), UN GA Res 36/55.

assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.[74]

166. This Commission is aware that religion is often linked to land, cultural beliefs and practices, and that freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion. The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois. During oral testimony, and indeed in the complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the lake, and Lake Bogoria is considered the spiritual home of all Endorois, living and dead.

167. It further notes that one of the beliefs of the Endorois is that their great ancestor, *Dorios*, came from the heavens and settled in the Mochongoi Forest.[75] It notes the complainants' arguments, which have not been contested by the respondent state, that the Endorois believe that each season the water of the lake turns red and the hot springs emit a strong odour, signalling a time that the community performs traditional ceremonies to appease the ancestors who drowned with the formation of the lake.

168. From the above analysis, the African Commission is of the view that the Endorois spiritual beliefs and ceremonial practices constitute a religion under the African Charter.

169. The African Commission will now determine whether the respondent state by its actions or inactions have interfered with the Endorois' right to religious freedom.

170. The respondent state has not denied that the Endorois' have been removed from their ancestral land they call home. The respondent state has merely advanced reasons why the Endorois can no longer stay within the Lake Bogoria area. The complainants argue that the Endorois' inability to practice their religion is a direct result of their expulsion from their land and that since their eviction the Endorois have not been able to freely practice their religion, as access for religious rituals has been denied the community.

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74 See *Free Legal Assistance Group v Zaire* [(2000) AHRLR 74 (ACHPR 1995)] African Commission on Human and Peoples Rights, comm 25/89, 47/90, 56/91, 100/93 (1995), para 45. See also the declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), UN GA Res 36/55.

75 See paras 73 and 74.

171. It is worth noting that in *Amnesty International v Sudan,* the African Commission recognised the centrality of practice to religious freedom.[76] The African Commission noted that the state party violated the authors' right to practice their religion, because non-Muslims did not have the right to preach or build their churches and were subjected to harassment, arbitrary arrest, and expulsion. The African Commission also notes the case of *Loren Laroye Riebe Star* from the IACmHR, which determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. It notes that the court held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.[77]

172. The African Commission agrees that in some situations it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right. It notes the recommendation of the HRC that limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.[78] The *raison d'être* for a particularly harsh limitation on the right to practice religion, such as that experienced by the Endorois, must be based on exceptionally good reasons, and it is for the respondent state to prove that such interference is not only proportionate to the specific need on which they are predicated, but is also reasonable. In the case of *Amnesty International v Sudan,* the African Commission stated that a wide-ranging ban on Christian associations was 'disproportionate to the measures required by the government to maintain public order, security, and safety'. The African Commission further went on to state that any restrictions placed on the rights to practice one's religion should be negligible. In the above mentioned case, the African Commission decided that complete and total expulsion from the land for religious ceremonies is not minimal.[79]

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[76] *Amnesty International and Others v Sudan,* African Commission on Human and Peoples' Rights, communication 48/90, 50/91, 52/91, 89/93 (1999) (hereinafter *Amnesty International v Sudan)*.

[77] *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo IzalElorz v Mexico,* Inter-American Commission on Human Rights, Report 49/99, Case 11.610, (1999). *Dianna Ortiz v Guatemala,* Inter-American Commission on Human Rights, Report 31/96, Case 10.526, (1997).

[78] Human Rights Committee, General Comment 22, article 18 (Forty-eighth session, 1993), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI\GEN\1\Rev.1 (1994), 35, para 8.

[79] The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission, in *Amnesty International v Zambia*, where it noted that the 'claw-back' clauses must not be

173. The African Commission is of the view that denying the Endorois access to the lake is a restriction on their freedom to practice their religion, a restriction not necessitated by any significant public security interest or other justification. The African Commission is also not convinced that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the area for economic reasons.

The African Commission therefore finds against the respondent state a violation of article 8 of the African Charter. The African Commission is of the view that the Endorois' forced eviction from their ancestral lands by the respondent state interfered with the Endorois' right to religious freedom and removed them from the sacred grounds essential to the practice of their religion, and rendered it virtually impossible for the Community to maintain religious practices central to their culture and religion.

The African Commission is of the view that the limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. This was the view of the Commission in *Amnesty International v Zambia* where it noted that the 'claw-back' clauses must not be interpreted against the principles of the Charter … and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter.[80]

Alleged violation of article 14

174. The complainants argue that the Endorois community have a right to property with regard to their ancestral land, the possessions attached to it, and their cattle. The respondent state denies the allegation.

175. The respondent state further argues that the land in question fell under the definition of trust land and was administered by the Baringo county council for the benefit of all the people who were ordinarily resident in their jurisdiction which comprised mainly the four Tungen tribes. It argues that trust land is not only established under the Constitution of Kenya and administered under an Act of parliament, but that the Constitution of Kenya provides that trust land may be alienated through registration to another person other than the county council; an Act of parliament providing for the county

interpreted against the principles of the Charter … and that recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter. See *Amnesty International v Sudan* (1999), paras 82 and 80.

80 *Amnesty International v Zambia,* African Commission on Human and Peoples' Rights, communication 212/98 (1999).

council to set apart an area of trust land vested in it for use and occupation of public body or authority for public purposes; person or persons or purposes which, in the opinion of the council, is likely to benefit the persons ordinarily resident in that area; by the President in consultation with the council. It argues that trust land may be set apart as government land for government purposes or private land.

176. The respondent state argues that when trust land is set apart for whatever purpose, the interest or other benefits in respect of that land that was previously vested in any tribe, group, family or individual under African customary law are extinguished. It, however, states that the Constitution and the Trust Land Act provide for adequate and prompt compensation for all residents. The respondent state, in both its oral and written submissions, is arguing that the Trust Land Act provides a comprehensive procedure for assessment of compensation where the Endorois should have applied to the district commissioner and lodged an appeal if they were dissatisfied. The respondent state further argues that the Endorois have a right of access to the High Court of Kenya by the Constitution to determine whether their rights have been violated.

177. According to the respondent state , with the creation of more local authorities, the land in question now comprises parts of Baringo and Koibatek county councils, and through Gazette notice no 239 of 1973, the land was first set apart as Lake Hannington game reserve, which was later revoked by Gazette notice no 270 of 1974, where the game reserve was renamed Lake Baringo game reserve, and the boundaries and purpose of setting apart this area specified in the gazette notices as required by the Trust Land Act. It argues that the government offered adequate and prompt compensation to the affected people, 'a fact which the applicants agree with'.[81]

178. In its oral and written testimonies, the respondent state argues that the gazettement of a game reserve under the wildlife laws of Kenya is with the objective of ensuring that wildlife is managed and conserved to yield to the nation in general and to individual areas in particular optimum returns in terms of cultural, aesthetic and scientific gains as well as economic gains as are incidental to proper wildlife management and conservation. The respondent state also argues that national reserves unlike national parks, where the Act expressly excludes human interference save for instances where one has gotten authorisation, are subject to agreements as to restrictions or conditions relating to the provisions of the area covered by the reserve. It also states that communities living around the national reserves *have in some instances* been allowed to drive their cattle to the reserve for the purposes of grazing, so long as they do not cause harm to the environment and the natural habitats of the wild animals. It states that with the establishment of a national reserve particularly

[81] See para 3.3.3 of the respondent's merits brief.

from trust land, it is apparent that the community's right of access is not extinguished, but rather its propriety right as recognised under the law (that is, the right to deal with property as it pleases) is the one which is minimised and hence the requirement to compensate the affected people.

179. Rebutting the claim of the complainants that the Kenyan authorities prevented them from occupying their other ancestral land, Muchongoi Forest, the respondent state argued that the land in question was gazetted as a forest in 1941, by the name of Ol Arabel Forest, which means that the land ceased being communal land by virtue of the gazettement. It states that some excisions have been made from the Ol Arablel Forest to create the Muchongoi Settlement Scheme to settle members of the four Tungen tribes of the Baringo district, one of which is the Endorois.

180. The respondent state also argues that it has also gone a step further to formulate '(r)ules', namely the 'The Forests (Tugen-Kamasia) Rules' to enable the inhabitants of the Baringo Duistrict, including the Endorois to enjoy some privileges through access to the Ol Arabel Forest for some purposes. The rules, it states, allow the community to collect dead wood for firewood, pick wild berries and fruits, take or collect the bark of dead trees for thatching beehives, cut and remove creepers and lianes for building purposes, take stock, including goats, to such watering places within the central forests as may be approved by the district commissioner in consultation with the forest officer, enter the forest for the purpose of holding customary ceremonies and rites, but no damage shall be done to any tree, graze sheep within the forest, graze cattle for specified periods during the dry season with the written permission of the district commissioner or the forest officer and to retain or construct huts within the forest by approved forest cultivators among others.

181. The respondent state argues further that the above rules ensure that the livelihoods of the community are not compromised by the gazettement, in the sense that the people could obtain food and building materials, as well as run some economic activities such as beekeeping and grazing livestock in the forest. They also say they were at liberty to practice their religion and culture. Further, it states that the due process of law regarding compensation was followed at the time of the said gazettement.

182. Regarding the issue of dispossession of ancestral land in the alleged Mochongoi Forest, the respondent state did not address it, as it argues that it was not part of the matters addressed by the High Court case, and therefore the African Commission would be acting as a tribunal of first instance if it did so.

183. The respondent state does not dispute that the Lake Bogoria area of the Baringo and Koibatek administrative districts is the

Endorois' ancestral land. One of the issues the respondent state is disputing is whether the Endorois are indeed a distinct community. That question has already been answered above. In para 1.1.6 of the respondent state merits brief, the state said: '(f)ollowing the declaration of the Lake Bogoriagame reserve, the government embarked on a resettlement exercise, culminating in the resettlement of the majority of the Endorois in the Mochongoi settlement scheme.*This was over and above the compensation paid to the Endorois after their ancestral land around the lake was gazetted*'.[82]

184. It is thus clear that the land surrounding Lake Bogoria is the traditional land of the Endorois people. In para 1 of the merits brief, submitted by the complainants, they write: '(t)he Endorois are a community of approximately 60, 000 people who, from time immemorial, have lived in the *Lake Bogoria area* of the Baringo and Koibatek administrative districts'.[83] In para 47, the complainants also state that: '(f)or centuries the Endorois have constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, grazing, and forest land, and relied on the land to sustain their livelihoods'. The complainants argue that apart from a confrontation with the Masai over the Lake Bogoria region three hundred years ago, the Endorois have been accepted by all neighbouring tribes, including the British crown, as *bona fide* owners of their land. The respondent state does not challenge those statements of the complainants. The only conclusion that could be reached is that the Endorois community has a right to property with regard to its ancestral land, the possessions attached to it, and their animals.

185. Two issues that should be disposed of before going into the more substantive questions of whether the respondent state has violated article 14 are a determination of what is a 'property right' (within the context of indigenous populations) that accords with African and international law, and whether special measures are needed to protect such rights, if they exist and whether Endorois' land has been encroached upon by the respondent state. The complainants argue that 'property rights' have an autonomous meaning under international human rights law, which supersedes national legal definitions. They state that both the European Court of Human Rights (ECHR) and IACtHR have examined the specific facts of individual situations to determine what should be classified as 'property rights', particularly for displaced persons, instead of limiting themselves to formal requirements in national law.[84]

82 Italics for emphasis.

83 Italics for emphasis.

84 See *The MayagnaAwasTingni v Nicaragua,* Inter-American Court of Human Rights, (2001), para 146 (hereinafter the *AwasTingni* case (2001)).The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law.

186. To determine that question, the African Commission will look, first, at its own jurisprudence and then at international case law. In *Malawi African Association and Others v Mauritania*, land was considered 'property' for the purposes of article 14 of the Charter.[85] The African Commission in the *Ogoni* case also found that the 'right to property' includes not only the right to have access to one's property and not to have one's property invaded or encroached upon,[86] but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[87] The African Commission also notes that the ECHR have recognised that 'property rights' could also include the economic resources and rights over the common land of the applicants.[88]

187. The complainants argue that both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems. Common problems faced by indigenous groups include the lack of 'formal' title recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities. This, they argue, has led to many cases of displacement from a people's historic territory, both by colonial authorities and post-colonial states relying on the legal title they inherited from the colonial authorities. The African Commission notes that its Working Group on Indigenous Populations/Communities has recognised that some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs.[89] The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.

188. The case of *Doğan and others v Turkey*[90] is instructive in the instant communication. Although the applicants were unable to

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85 *Malawi African Association and Others v Mauritania*, [*(2000) AHRLR 149 (ACHPR 2000)]* African Commission on Human and Peoples' Rights, comm 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), para 128.

86 *The Ogoni* case (2001), para 54.

87 Communication 225/98 [Huri-Laws v Nigeria (2000) AHRLR 273 (ACHPR 2000)], para 52.

88 See *Doğan and Others v Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras 138-139.

89 See Report of the African Commission's Working Group of Experts, Submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

90 *Doğan and Others v Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras 138-139.

demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that:

> [T]he notion 'possessions' in article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.[91]

189. Although they did not have registered property, they either had their own houses constructed on the land of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The court further noted that the applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling.

190. The African Commission also notes the observation of the IACtHR in the seminal case of *The Mayagna (Sumo) AwasTingni v Nicaragua,*[92] that the Inter-American Convention protected property rights in a sense which include the rights of members of the indigenous communities within the framework of communal property and argued that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.

191. In the opinion of the African Commission, the respondent state has an obligation under article 14 of the African Charter not only to *respect* the 'right to property', but also to *protect* that right. In 'the *Mauritania* cases',[93] the African Commission concluded that the confiscation and pillaging of the property of black Mauritanians and the expropriation or destruction of their land and houses before forcing them to go abroad constituted a violation of the right to property as guaranteed in article 14. Similarly, in *The Ogoni* case 2001[94] the African Commission addressed factual situations involving removal of people from their homes. The African Commission held that the removal of people from their homes violated article 14 of the African Charter, as well as the right to adequate housing which, although not explicitly expressed in the African Charter, is also

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91 *Doğan and Others v Turkey*, European Court of Human Rights, Applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), para 138-139.

92 *The AwasTingni* case (2001), paras 140(b) and 151.

93 African Commission on Human and Peoples' Rights, communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

94 African Commission on Human and Peoples' Rights, Decision 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights — Nigeria (27 May 2002), Fifteenth Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, done at the 31st ordinary session of the African Commission held from 2 to 16 May 2002 in Pretoria, South Africa.

guaranteed by article 14.[95]

192. The *Saramaka* case also sets out how the failure to recognise an indigenous/tribal group becomes a violation of the 'right to property.'[96] In its analysis of whether the state of Suriname had adopted an appropriate framework to give domestic legal effect to the 'right to property', the IACtHR addressed the following issues:

> This controversy over who actually represents the Saramaka people is precisely a natural consequence of the lack of recognition of their juridical personality.[97]

193. In the *Saramaka* case, the state of Suriname did not recognise that the Saramaka people can enjoy and exercise property rights as a community. The court observed that other communities in Suriname have been denied the right to seek judicial protection against alleged violations of their collective property rights precisely because a judge considered they did not have the legal capacity necessary to request such protection. This, the court opined, placed the Saramaka people in a vulnerable situation where individual 'property rights' may trump their rights over communal property, and where the Saramaka people may not seek, as a juridical personality, judicial protection against violations of their 'property rights' recognised under article 21 of the Convention.

194. As is in the instant case before the African Commission, the state of Suriname acknowledged that its domestic legal framework did not recognise the right of the members of the Saramaka people to the use and enjoyment of property in accordance with their system of communal property, but rather a privilege to use land. It also went on to provide reasons, as to why it should not be held accountable for giving effect to the Saramaka claims to a right to property, for example because the land tenure system of the Saramaka people, particularly regarding who owns the land, presents a practical problem for state recognition of their right to communal property. The IACtHR rejected all of the state's arguments. In the present communication, the High Court of Kenya similarly dismissed any claims based on historic occupation and cultural rights.[98]

195. The IACtHR went further to say that, in any case, the alleged lack of clarity as to the land tenure system of the Saramakas should not present an insurmountable obstacle for the state, which has the

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95 African Commission on Human and Peoples' Rights, Communication 155/96, The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights — Nigeria (27 May 2002) (citing Committee on Economic, Social and Cultural Rights, General Comment No 7, The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions, para 4, UN Doc E/C.12/1997/4 (1997)).

96 Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

97 Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (Judgment of 28 November 2007).

98 *Op cit*, paras 11 and 12.

duty to consult with the members of the Saramaka people and seek clarification of this issue, in order to comply with its obligations under article 21 of the Convention.

196. In the present communication, the respondent state (the Kenyan government) during the oral hearings argued that legislation or special treatment in favour of the Endorois might be perceived as being discriminatory. The African Commission rejects that view. The African Commission is of the view that the respondent state cannot abstain from complying with its international obligations under the African Charter merely because it might be perceived to be discriminatory to do so. It is of the view that in certain cases, positive discrimination or affirmative action helps to redress imbalance. The African Commission shares the respondent state's concern over the difficulty involved; nevertheless, the state still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law. Besides, it is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination.[99] Legislation that recognises said differences is therefore not necessarily discriminatory.

197. Again drawing on the *Saramaka v Suriname* case, which confirms earlier jurisprudence of the *Moiwana v Suriname*, *YakyeAxa v Paraguay*[100], *Sawhoyamaxa v Paraguay*,[101] and *MayagnaAwasTingni v Nicaragua*;[102] the *Saramaka* case has held that '(s)pecial measures of protection are owed to members of the tribal community to

[99] See *ECHR, Connors v The United Kingdom*, (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way of providing equality under the law). See also IACmHR Report on the Situation of Human Rights in Ecuador, (stating that 'within international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival — a right protected in a range of international instruments and conventions'). See also UN International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1.4 (stating that '[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination'), and UNCERD, General Recommendation 23, Rights of indigenous peoples, para 4 (calling upon States to take certain measures in order to recognise and ensure the rights of indigenous peoples).

[100] *Indigenous Community YakyeAxa v Paraguay* 17 June 2005, Inter American Court of Human Rights.

[101] Case of the *Sawhoyamaxa Indigenous Community v Paraguay,* judgment of 29 March 2006 Inter-American Court of Human Rights.

[102] See *The Mayagna AwasTingni v Nicaragua*, Inter-American Court of Human Rights, (2001) hereinafter the *AwasTingni* case 2001.

guarantee the full exercise of their rights'. The IACtHR stated that based on article 1(1) of the Convention, members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of 'property rights' in order to safeguard their physical and cultural survival.

198. Other sources of international law have similarly declared that such special measures are necessary. In the *Moiwana* case, the IACtHR determined that another Maroon community living in Suriname was also not indigenous to the region, but rather constituted a tribal community that settled in Suriname in the 17th and 18th century, and that this tribal community had 'a profound and all-encompassing relationship to their ancestral lands' that was centred, not 'on the individual, but rather on the community as a whole'. This special relationship to land, as well as their communal concept of ownership, prompted the court to apply to the tribal Moiwana community its jurisprudence regarding indigenous peoples and their right to communal property under article 21 of the Convention.

199. The African Commission is of the view that even though the Constitution of Kenya provides that trust land may be alienated and that the Trust Land Act provides comprehensive procedure for the assessment of compensation, the Endorois *property rights* have been encroached upon, in particular by the expropriation and the effective denial of ownership of their land. It agrees with the complainants that the Endorois were never given the full title to the land they had in practice before the British colonial administration. Their land was instead made subject to a trust, which gave them beneficial title, but denied them actual title. The African Commission further agrees that though for a decade they were able to exercise their traditional rights without restriction, the trust land system has proved inadequate to protect their rights.

200. The African Commission also notes the views expressed by the Committee on Economic, Social and Cultural Rights which has provided a legal test for forced removal from lands which is traditionally claimed by a group of people as their property. In its 'General Comment No 4' it states that 'instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the *most exceptional circumstances,* and in accordance with the relevant principles of international law'.[103] This view has also been reaffirmed by the United Nations Commission on Human Rights which states that forced evictions are a gross

[103] Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), para 18, UN Doc E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 18 (2003).

violations of human rights, and in particular the right to adequate housing.[104] The African Commission also notes 'General Comment No 7' requiring state parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.[105]

201. The African Commission is also inspired by the European Commission of Human Rights. Article 1 of Protocol 1 to the European Convention states:

> Every natural or legal person is entitled to the peaceful enjoyment of his [or her] possessions. No one shall be deprived of his [or her] possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.[106]

202. The African Commission also refers to *Akdivar and Others v Turkey*. The European Court held that forced evictions constitute a violation of article 1 of Protocol 1 to the European Convention. *Akdivar and Others* involved the destruction of housing in the context of the ongoing conflict between the government of Turkey and Kurdish separatist forces. The petitioners were forcibly evicted from their properties, which were subsequently set on fire and destroyed. It was unclear which party to the conflict was responsible. Nonetheless, the European Court held that the government of Turkey violated both article 8 of the European Convention and article 1 of Protocol 1 to the European Convention because it has a duty to *both respect and protect* the rights enshrined in the European Convention and its Protocols.

203. In the instant case, the respondent state sets out the conditions when trust land is set apart for whatever purpose.[107]

204. The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 advisory opinion, deals extensively with land rights. The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous

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[104] See, Commission on Human Rights resolution 1993/77, UN Doc E/C.4/RES/1993/77 (1993); Commission on Human Rights Resolution 2004/28, UN Doc E/C.4/RES/2004/28 (2004).

[105] See Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para 14, UN Doc E/1998/22, annex IV at 113 (1998), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.6 at 45 (2003).

[106] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art 1, 213 UNTS 262, entered into force 18 May 1954.

[107] See 3.2.0 of the Respondent state Brief on the merits. See also para 178 of this judgment where the Respondent state argues that the community's rights of access is not extinguished.

peoples would remain vulnerable to further violations/dispossession by the state or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.[108]

205. The Inter-American Court jurisprudence also makes it clear that mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples' effective protection.[109]

206. In the *Saramaka* case, the court held that the state's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The court held that, rather than a privilege to use the land, which can be taken away by the state or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognised and respected not only in practice but also in law in order to ensure its legal certainty. In order to obtain such title, the territory traditionally used and occupied by the members of the Saramaka people must first be delimited and demarcated, in consultation with such people and other neighbouring peoples. The situation of the Endorois is not different. The respondent state simply wants to grant them privileges such as restricted access to ceremonial sites. This, in the opinion of the Commission, falls below internationally recognised norms. The respondent state must grant title to their territory in order to guarantee its permanent use and enjoyment.

207. The African Commission notes that that articles 26 and 27 of the UN Declaration on Indigenous Peoples use the term 'occupied or otherwise used'. This is to stress that indigenous peoples have a recognised claim to ownership to ancestral land under international law, even in the absence of official title deeds. This was made clear in the judgment of *AwasTingni v Nicaragua*. In the current leading international case on this issue, the *Mayagna (Sumo) AwasTingni v Nicaragua,*[110] the IACtHR recognised that the Inter-American Convention protected property rights 'in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property'.[111] It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[112]

[108] See art 8(2) (b), 10, 25, 26 and 27 of the UN declaration on the Rights of Indigenous Peoples.
[109] Para 110 of the *Saramaka* case.
[110] *The AwasTingni* case (2001), paras 140(b) and 151.
[111] Ibid, at para 148.
[112] Ibid, at para 151.

208. The African Commission also notes that in the case of *Sawhoyamaxa v Paraguay*, the IACtHR, acting within the scope of its adjudicatory jurisdiction, decided on indigenous land possession in three different situations, viz: in the case of the *Mayagna (Sumo) AwasTingni Community*, the court pointed out that possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration;[113] in the case of the *Moiwana Community*, the court considered that the members of the N'djuka people were the 'legitimate owners of their traditional lands', although they did not have possession thereof, because they left them as a result of the acts of violence perpetrated against them, though in this case, the traditional lands were not occupied by third parties.[114] Finally, in the case of the *Indigenous Community YakyeAxa*, the court considered that the members of the community were empowered, even under domestic law, to file claims for traditional lands and ordered the state, as measure of reparation, to individualise those lands and transfer them on a no consideration basis.[115]

209. In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights. The instant case of the Endorois is categorised under this last conclusion. The African Commission thus agrees that the land of the Endorois has been encroached upon.

210. That such encroachment has taken place could be seen by the Endorois' inability, after being evicted from their ancestral land, to have free access to religious sites and their traditional land to graze their cattle. The African Commission is aware that access roads, gates, game lodges and a hotel have all been built on the ancestral land of the Endorois community around Lake Bogoria and imminent mining operations also threatens to cause irreparable damage to the

[113] See case of the *Mayagna (Sumo) AwasTingni Community*, supra note 184, para 151.
[114] See case of the *Moiwana Community*. Judgment of 15 June 2005. Series C No 124 para 134.
[115] See case of the *Indigenous Community YakyeAxa*, supra note 1, paras 124-131.

land. The African Commission has also been notified that the respondent state is engaged in the demarcation and sale of parts of Endorois historic lands to third parties.

211. The African Commission is aware that encroachment in itself is not a violation of article 14 of the Charter, as long as it is done in accordance with the law. Article 14 of the African Charter indicates a two-pronged test, where that encroachment can only be conducted — 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws'. The African Commission will now assess whether an encroachment 'in the interest of public need' is indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands. The African Commission agrees with the complainants that the test laid out in article 14 of the Charter is *conjunctive*, that is, in order for an encroachment not to be in violation of article 14, it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws.

212. The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was stressed by the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights who published the following statement:

> Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.[116]

213. Limitations on rights, such as the limitation allowed in article 14, must be reviewed under the principle of proportionality. The Commission notes its own conclusions that '… the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow'.[117] The African Commission also notes the decisive case of *Handyside v United Kingdom*, where the ECHR stated that any condition or restriction

[116] Nazila Ghanea and Alexandra Xanthaki (2005) (eds). *'Indigenous Peoples' Right to Land and Natural Resources' in* Erica-Irene Daes 'Minorities, Peoples and Self-Determination', Martinus Nijhoff Publishers.

[117] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, [(2000) AHRLR 227 (ACHPR 1999)] African Commission on Human and Peoples' Rights, Comm Nos. 140/94, 141/94, 145/95 (1999), para 42 (hereinafter *Constitutional Rights Project* case 1999).

imposed upon a right must be 'proportionate to the legitimate aim pursued'.[118]

214. The African Commission is of the view that any limitations on rights must be proportionate to a legitimate need, and should be the least restrictive measures possible. In the present communication, the African Commission holds the view that in the pursuit of creating a game reserve, the respondent state has unlawfully evicted the Endorois from their ancestral land and destroyed their possessions. It is of the view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the game reserve.

215. It is also of the view that even if the game reserve was a legitimate aim and served a public need, it could have been accomplished by alternative means proportionate to the need. From the evidence submitted both orally and in writing, it is clear that the community was willing to work with the government in a way that respected their property rights, even if a game reserve was being created. In that regard, the African Commission notes its own conclusion in the *Constitutional Rights Project* case, where it says that 'a limitation may not erode a right such that the right itself becomes *illusory*'.[119] At the point where such a right becomes illusory, the limitation cannot be considered proportionate — the limitation becomes a violation of the right. The African Commission agrees that the respondent state has not only denied the Endorois community all legal rights in their ancestral land, rendering their property rights essentially illusory, but in the name of creating a game reserve and the subsequent eviction of the Endorois community from their own land, the respondent state has violated the very essence of the right itself, and cannot justify such an interference with reference to 'the general interest of the community' or a 'public need'.

216. The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law. Incorporating the right to life into the threshold of the 'public interest test' is further confirmed by jurisprudence of the IACtHR. In *YakyeAxa v Paraguay* the Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity.

217. The IACtHR held that one of the obligations that the state must inescapably undertake as guarantor to protect and ensure the right to

[118] *Handyside v United* Kingdom, application 5493/72, Series A.24 (7 December 1976), para 49.
[119] *The Constitutional Rights Project case*, para 42.

life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the state has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.

218. The African Commission also notes that the 'disproportionate' nature of an encroachment on indigenous lands — therefore falling short of the test set out by the provisions of article 14 of the African Charter — is to be considered an even greater violation of article 14, when the displacement at hand was undertaken by force. Forced evictions, by their very definition, cannot be deemed to satisfy article 14 of the Charter's test of being done 'in accordance with the law'. This provision must mean, at the minimum, that both Kenyan law and the relevant provisions of international law were respected. The grave nature of forced evictions could amount to a gross violation of human rights. Indeed, the United Nations Commission on Human Rights, in Resolutions 1993/77 and 2004/28, has reaffirmed that forced evictions amount to a gross violations of human rights and in particular the right to adequate housing.[120] Where such removal was forced, this would in itself suggest that the 'proportionality' test has not been satisfied.

219. With respect to the 'in accordance with the law' test, the respondent state should also be able to show that the removal of the Endorois was not only in the public interest, but their removal satisfied both Kenyan and international law. If it is settled that there was a trust in favour of the Endorois, was it legally extinguished? If it was, how was it satisfied? Was the community adequately compensated? Also, did the relevant legislation creating the game reserve, expressly required the removal of the Endorois from their land?

220. The African Commission notes that the respondent state does not contest the claim that the traditional lands of the Endorois people are classified as trust land. In fact section 115 of the Kenyan Constitution gives effect to that claim. In the opinion of the African Commission it created a beneficial right for the Endorois over their ancestral land. This should have meant that the county council should give effect to such rights, interest or other benefits in respect of the land.

221. The complainants argue that the respondent state created the Lake Hannington game reserve, including the Endorois indigenous

[120] See United Nations Commission on Human Rights resolution 1993/77, UN Doc E/CN.4/1993/RES/77 and United Nations Commission on Human Rights resolution 2004/28, UN Doc E/CN.4/2004/RES/28. Both resolutions reaffirm that the practice of forced eviction is a gross violations of human rights and in particular the right to adequate housing.

lands, on 9 November 1973. The name was changed to Lake Bogoria game reserve in a second notice in 1974.[121] The 1974 notice was made by the Kenyan Minister for Tourism and Wildlife under the Wild Animals Protection Act (WAPA).[122] The complainants argue that WAPA applied to trust land as it did to any other land, and did not require that the land be taken out of the Trust before a game reserve could be declared over that land.

222. They further argue that the relevant legislation did not give authority for the removal of any individual or group occupying the land in a game reserve. Instead, WAPA merely prohibited the hunting, killing or capturing of animals within the game reserve.[123] The complainants argue that despite no clear legal order asking them to relocate to another land, the Endorois community was informed from 1973 onwards that they would have to leave their ancestral lands.

223. In rebuttal, the respondent state argues that the Constitution of Kenya provides that trust land may be alienated. It also states that the 'government offered adequate and prompt compensation to the affected people ...'.[124] As regards the complainants' claim that the respondent state prevented the Endorois community from accessing their other ancestral lands, Muchongoi Forest, the respondent state argues that the land in question was gazetted in 1941 by the name of Ol Arabel Forest with the implication that the land ceased being communal by virtue of the gazettement.

224. The African Commission agrees that WAPA merely prohibited the hunting, killing or capturing of animals within the game reserve.[125] Additionally, the respondent state has not been able to prove without doubt that the eviction of the Endorois community satisfied both Kenyan and international law. The African Commission is not convinced that the whole process of removing the Endorois from their ancestral land satisfied the very stringent international law provisions. Furthermore, the mere gazetting of trust land is not sufficient to legally extinguish the trust. WAPA should have required that the land be taken out of the trust before a game reserve could be declared over that land. This means that the declaration of the Lake Bogoriagame reserve by way of the 1974 notice did not affect the status of the Endorois land as trust land. The obligation of Baringo

[121] Pursuant to Kenyan law, the authorities published notice 239/1973 in the Kenya Reserve to declare the creation of 'Lake Hannington game reserve'. Gazette notice 270/1974 was published to revoke the earlier notice and change the name of the game reserve on 12 October 1974: 'the area set forth in the schedule hereto to be a game reserve known as Lake Bogoria game reserve.'

[122] See s 3(2) for relevant parts of WAPA. Section 3(2) was subsequently revoked on 13 February 1976 by s 68 of the Wildlife Conservation and Management Act.

[123] See s 3(20) of WAPA, which did not allow the Kenyan Minister for Tourism and Wildlife to remove the present occupiers.

[124] See para 3.3.3 of the respondent state's merits brief.

[125] See note 125.

and Koibatek county councils to give effect to the rights and interests of the Endorois people continued. That also has to be read in conjunction with the concept of adequate compensation. The African Commission is in agreement with the complainants that the only way under Kenyan law in which Endorois benefit under the trust could have been dissolved is if the county council or the President of Kenya had 'set apart' the land. However, the Trust Land Act required that to be legal, such setting apart of the land must be published in the Kenyan Gazette.[126]

225. Two further elements of the 'in accordance with the law' test relate to the requirements of consultation and compensation.

226. In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that *consent* be accorded. Failure to observe the obligations to consult and to seek consent — or to compensate — ultimately results in a violation of the right to property.

227. In the *Saramaka* case, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory do not amount to a denial of their survival as a tribal people, the court stated that the state must abide by the following three safeguards: first, ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Saramaka territory; second, guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; third, ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.

228. In the instant case, the African Commission is of the view that no effective participation was allowed for the Endorois, nor has there been any reasonable benefit enjoyed by the community. Moreover, *a prior* environment and social impact assessment was not carried out. The absence of these three elements of the 'test' is tantamount to a violation of article 14, the right to property, under the Charter. The failure to guarantee effective participation and to guarantee a reasonable share in the profits of the game reserve (or other

[126] The mechanics of such a 'setting apart' of trust land under s117 or s118 of the Constitution are laid down by the Kenyan Trust Land Act. Publication is required by s 13(3) and (4) of the Trust Land Act in respect of s 117 Constitution, and by s 7(1) and (4) of the Trust Land Act in respect of s 118 Constitution.

adequate forms of compensation) also extends to a violation of the right to development.

229. On the issue of compensation, the respondent state in rebutting the complainants' allegations that inadequate compensation was paid, argues that the complainants do not contest that a form of compensation was done, but that they have only pleaded that about 170 families were compensated. It further argues that, if at all the compensations paid was not adequate, the Trust Land Act provides for a procedure for appeal, for the amount and the people who feel that they are denied compensation over their interest.

230. The respondent state does not deny the complainants' allegations that in 1986, of the 170 families evicted in late 1973, from their homes within the Lake Bogoriagame reserve, each receiving around 3,150 Kshs (at the time, this was equivalent to approximately £30). Such payment was made some 13 years after the first eviction. It does not also deny the allegation that £30 did not represent the market value of the land gazetted as Lake Bogoriagame reserve. It also does not deny that the Kenyan authorities have themselves recognised that the payment of 3,150 Kshs per family amounted only to 'relocation assistance', and does not constitute full compensation for loss of land.

231. The African Commission is of the view that the respondent state did not pay the prompt, full compensation as required by the Constitution. It is of the view that Kenyan law has not been complied with and that though some members of the Endorois community accepted limited monetary compensation that did not mean that they accepted it as full compensation, or indeed that they accepted the loss of their land.

232. The African Commission notes the observations of the United Nations Declaration on the Rights of Indigenous Peoples, which, amongst other provisions for restitutions and compensations states:

> Indigenous peoples have the right to restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.[127]

233. In the case of *YakyeAxa v Paraguay* the court established that any violation of an international obligation that has caused damage

[127] Declaration on the Rights of Indigenous Peoples, preambular para 5, E/CN.4/ Sub.2/1994/2/Add.1 (1994).

entails the duty to provide appropriate reparations.[128] To this end, article 63(1) of the American Convention establishes that:

> [i]f the court finds that there has been a violation of a right or freedom protected by th[e] Convention, the court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

234. The court said that once it has been proved that land restitution rights are still current, the state must take the necessary actions to return them to the members of the indigenous people claiming them. However, as the court has pointed out, when a state is unable, on objective and reasonable grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures.[129] This was not the case in respect of the Endorois. The land given them is not of equal quality.

235. The reasons of the government in the instant communication are questionable for several reasons including: (a) the contested land is the site of a conservation area, and the Endorois — as the ancestral guardians of that land — are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work begun by the government; (c) no other community have settled on the land in question, and even if that is the case, the respondent state is obliged to rectify that situation,[130](d) the land has not been spoliated and is thus inhabitable; (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law.

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[128] See *Case of HuilcaTecse*. Judgment of 3 March 2005. Series C No 121, para 86, and case of the *Serrano Cruz Sisters*, para 133.

[129] See case of the *Indigenous Community Yakye Axa*, para 149.

[130] Indeed, at para 140 of the *Sawhoyamaxa Indigenous Community v Paraguay* case, the Inter-American Court stresses that: 'Lastly, with regard to the third argument put forth by the state, the Court has not been furnished with the aforementioned treaty between Germany and Paraguay, but, according to the state, said convention allows for capital investments made by a contracting party to be condemned or nationalized for a "public purpose or interest", which could justify land restitution to indigenous people. Moreover, the Court considers that the enforcement of bilateral commercial treaties negates vindication of non-compliance with state obligations under the American Convention; on the contrary, their enforcement should always be compatible with the American Convention, which is a multilateral treaty on human rights that stands in a class of its own and that generates rights for individual human beings and does not depend entirely on reciprocity among states.'

236. It seems also to the African Commission that the amount of £30 as compensation for one's ancestral home land flies in the face of common sense and fairness.

237. The African Commission notes the detailed recommendations regarding compensation payable to displaced or evicted persons developed by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.[131] These recommendations, which have been considered and applied by the European Court of Human Rights,[132] set out the following principles for compensation on loss of land: Displaced persons should be (i) compensated for their losses at full replacement cost prior to the actual move; (ii) assisted with the move and supported during the transition period in the resettlement site; and (iii) assisted in their efforts to improve upon their former living standards, income earning capacity and production levels, or at least to restore them. These recommendations could be followed if the respondent state is interested in giving a fair compensation to the Endorois.

238. Taking all the submissions of both parties, the African Commission agrees with the complainants that the property of the Endorois people has been severely encroached upon and continues to be so encroached upon. The encroachment is not proportionate to any public need and is not in accordance with national and international law. Accordingly, the African Commission finds for the complainants that the Endorois as a distinct people have suffered a violation of article 14 of the Charter.

Alleged violation of article 17(2) and (3)

239. The complainants allege that the Endorois' cultural rights have been violated on two counts: first, the community has faced systematic restrictions on access to cultural sites and, second that the cultural rights of the community have been violated by the serious damage caused by the Kenyan authorities to their pastoralist way of life.

240. The respondent state denies the allegation claiming that access to the forest areas was always permitted, subject to administrative procedures. The respondent state also submits that in some instances some communities have allowed political issues to be disguised as cultural practices and in the process they endanger the peaceful coexistence with other communities. The respondent state does not substantiate who these 'communities' or what these 'political issues to be disguised as cultural practices' are.

[131] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Guidelines on International Events and Forced Evictions (*Forty-seventh session, 1995), UN Doc E/CN.4/Sub.2/1995/13. 17 July 1995, para 16(b) and (e).

[132] *Doğan v Turkey* (2004), para 154.

241. The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples and synagogues. Both the complainants and the respondent state seem to agree on that. It notes that article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals' participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society — the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It has also understood cultural identity to encompass a group's religion, language, and other defining characteristics.[133]

242. The African Commission notes that the preamble of the African Charter acknowledges that 'civil and political rights cannot be dissociated from economic, social and cultural rights ... social, cultural rights are a guarantee for the enjoyment of civil and political rights', ideas which influenced the 1976 African Cultural Charter which in its preamble highlights 'the inalienable right [of any people] to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas'.[134] Article 3 of the same Charter states that culture is a source of mutual enrichment for various communities.[135]

243. This Commission also notes the views of the Human Rights Committee with regard to the exercise of the cultural rights protected under article 27 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. The Committee observes that 'culture manifests itself in many forms, including a particular way of life associated with the use of *land resources*, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them'.[136]

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[133] Rachel Murray and Steven Wheatley (2003) 'Groups and the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, 25, p 224.

[134] African Cultural Charter (1976), para 6 of the Preamble.

[135] *Ibid* art 3.

[136] Human Rights Committee, General Comment 23 (Fiftieth session, 1994), UN Doc CCPR/C/21Rev.1/Add5, (1994) para 7.

244. The African Commission notes that a common theme that usually runs through the debate about culture and its violation is the association with one's ancestral land. It notes that its own Working Group on Indigenous Populations/Communities has observed that dispossession of land and its resources is 'a major human rights problem for indigenous peoples'.[137] It further notes that a report from the Working Group has also emphasised that dispossession 'threatens the economic, social and *cultural survival* of indigenous pastoralist and hunter-gatherer communities'.[138]

245. In the case of indigenous communities in Kenya, the African Commission notes the critical 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People in Kenya' that 'their *livelihoods and cultures have been traditionally discriminated again*st and their lack of legal recognition and empowerment reflects their social, political and economic marginalization'.[139] He also said that the principal human rights issues they face 'relate to the loss and environmental degradation of their land, traditional forests and natural resources, as a result of dispossession in colonial times and in the post-independence period. In recent decades, inappropriate development and conservationist policies have aggravated the violation of their economic, social and *cultural rights*.'[140]

246. The African Commission is of the view that in its interpretation of the African Charter, it has recognised the duty of the state to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group. It has thus interpreted article 17(2) as requiring governments to take measures 'aimed at the conservation, development and diffusion of culture', such as promoting 'cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; ... promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population'.[141]

247. The African Commission's WGIP has further highlighted the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

> Indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more

[137] Report of the African Commission's Working Group on Indigenous Populations/ Committees (2003), p 20.

[138] Ibid p 20.

[139] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, supra n 47.

[140] Ibid. Italics added for emphasis.

[141] *Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples Rights 1988-1989*, ACHPR/RPT/2nd, Annex XII.

dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation.[142]

248. The African Commission is of the opinion that the respondent state has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois,[143] but also to promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities. These challenges include exclusion, exploitation, discrimination and extreme poverty; displacement from their traditional territories and deprivation of their means of subsistence; lack of participation in decisions affecting the lives of the communities; forced assimilation and negative social statistics among other issues and, at times, indigenous communities suffer from direct violence and persecution, while some even face the danger of extinction.[144]

249. In its analysis of article 17 of the African Charter, the African Commission is aware that unlike articles 8 and 14, article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the respondent state were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights. Thus, even if the creation of the game reserve constitutes a legitimate aim, the respondent state's failure to secure access, as of right, for the celebration of the cultural festival and rituals cannot be deemed proportionate to that aim. The Commission is of the view that the cultural activities of the Endorois community pose no harm to the ecosystem of the game reserve and the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community.

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142 Report of the African Commission's Working Group on Indigenous Populations/ Committees (2005), p 20. [Emphasis added]

143 See UN declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, article 4(2): States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs; CERD General Recommendation XXIII, article 4(e): Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages; International Covenant on Economic, Social and Cultural Rights, article 15(3).

144 See statement by Mr Sha Zukang Under-Secretary General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People to the Third Committee of the General Assembly on the Item 'Indigenous Issues' New York, 20 October 2008.

250. It is the opinion of the African Commission that the respondent state has overlooked that the universal appeal of great culture lies in its particulars and that imposing burdensome laws or rules on culture undermines its enduring aspects. The respondent state has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artifacts closely linked to access to the Lake.

251. By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the respondent state have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the respondent state is found to have violated article 17(2) and (3) of the Charter.

Alleged violation of article 21

252. The complainants allege that the Endorois community has been unable to access the vital resources in the Lake Bogoria region since their eviction from the game reserve.

253. The respondent state denies the allegation. It argues that it is of the view that the complainants have immensely benefited from the tourism and mineral prospecting activities, noting for example:

(a) Proceeds from the game reserve have been utilised to finance a number of projects in the area, such as schools, health facilities, wells and roads.

(b) Since the discovery of ruby minerals in the Weseges area near Lake Bogoria, three companies have been issued with prospecting licences, noting that two out of three companies belong to the community, including the Endorois. In addition, the company which does not consist of the locals, namely Corby Ltd, entered into an agreement with the community, binding itself to deliver some benefits to the latter in terms of supporting community projects. It states that it is evident (from the minutes of a meeting of the community and the company) that the company is ready to undertake a project in the form of an access road to the prospecting site for the community's and prospecting company's use.

(c) The respondent state also argues that the mineral prospecting activities are taking place outside the Lake Bogoria game reserve, which means that the land is not the subject matter of the applicants' complaint.

254. The respondent state also argue that the community has been holding consultations with Corby Ltd., as evidence by the agreement between them is a clear manifestation of the extent to which the former participants in the decisions touch on the exploitation of the natural resources and the sharing of the benefits emanating therefrom.

255. The African Commission notes that in the *Ogoni* case the right to natural resources contained within their traditional lands is also vested in the indigenous people, making it clear that a people inhabiting a specific region within a state could also claim under article 21 of the African Charter.[145] The respondent state does not give enough evidence to substantiate the claim that the complainants have immensely benefited from the tourism and mineral prospecting activities.

256. The African Commission notes that proceeds from the game reserve have been used to finance a lot of useful projects, 'a fact' that the complainants do not contest. The African Commission, however, refers to cases in the Inter-American Human Rights system to understand this area of the law. The American Convention does not have an equivalent of the African Charter's article 21 on the Right to Natural Resources. It therefore reads the right to natural resources into the right to property (article 21 of the American Convention), and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The 'test' in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous land.

257. In the *Saramaka* case and Inter-American case law, an issue that flows from the IACtHR assertion that the members of the Saramaka people have a right to use and enjoy their territory in accordance with their traditions and customs is the issue of the right to the use and enjoyment of the natural resources that lie on and within the land, including subsoil natural resources. In the *Saramaka* case both the state and the members of the Saramaka people claim a right to these natural resources. The Saramakas claim that their right to use and enjoy all such natural resources is a necessary condition for the enjoyment of their right to property under article 21 of the Convention. The state argued that all rights to land, particularly its subsoil natural resources, are vested in the state, which it can freely dispose of these resources through concessions to third parties.

258. The IACtHR addressed this complex issue in the following order: first, the right of the members of the Saramaka people to use and enjoy the natural resources that lie on and within their traditionally owned territory; second, the state's grant of concessions for the exploration and extraction of natural resources, including subsoil resources found within Saramaka territory; and finally, the fulfilment of international law guarantees regarding the exploration extraction concessions already issued by the state.

259. First, the IACtHR analysed whether and to what extent the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned

[145] The *Ogoni* case (2001) paras 56-58.

territory. The state did not contest that the Saramakas have traditionally used and occupied certain lands for centuries, or that the Saramakas have an interest' in the territory they have traditionally used in accordance with their customs. The controversy was the nature and scope of the said interest. In accordance with Suriname's legal and constitutional framework, the Saramakas do not have property rights *per se*, but rather merely a privilege or permission to use and occupy the land in question. According to article 41 of the Constitution of Suriname, and article 2 of its 1986 Mining Decree, ownership rights of all natural resources are vested in the state. For this reason, the state claimed to have an inalienable right to the exploration and exploitation of those resources. On the other hand, the customary laws of the Saramaka people give them a right over all natural resources within its traditional territory.

260. The IACtHR held that the cultural and economic survival of indigenous and tribal peoples and their members depends on their access and use of the natural resources in their territory that are related to their culture and are found therein, and that article 21 of the Inter-American Convention protects their right to such natural resources. The court further said that in accordance with their previous jurisprudence as stated in the *YakyeAxa* and *Sawhoyamaxa* cases, members of tribal and indigenous communities have the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land they have traditionally used and occupied for centuries. Without them, the very physical and cultural survival of such peoples is at stake;[146] hence, the court opined, the need to protect the lands and resources they have traditionally used to prevent their extinction as a people. It said that the aim and purpose of special measures required on behalf of members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by states.

261. But the court further said that the natural resources found on and within indigenous and tribal people's territories that are protected under article 21 (of the American Convention) are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[147]

262. In the *Saramaka* case, the court had to determine which natural resources found on and within the Saramaka people's territory are essential for the survival of their way of life, and are

[146] See case of the *Indigenous Community YakyeAxa*, and the case of the *Indigenous Sawhoyamaxa Community*.
[147] Ibid.

thus protected under article 21 of the Convention. This has direct relevance to the matter in front of the African Commission, given the ruby mining concessions which were taking place on lands, both ancestral and adjacent to Endorois ancestral land, and which the complainants allege poisoned the only remaining water source to which the Endorois had access.

263. The African Commission notes the opinion of the IACtHR in the *Saramaka* case as regards the issue of permissible limitations. The state of Suriname had argued that, should the court recognise a right of the members of the Saramaka people to the natural resources found within traditionally owned lands, this right must be limited to those resources traditionally used for their subsistence, cultural and religious activities. According to the state, the alleged land rights of the Saramakas would not include any interests on forests or minerals beyond what the tribe traditionally possesses and uses for subsistence (agriculture, hunting, fishing etc), and the religious and cultural needs of its people.

264. The court opined that while it is true that all exploration and extraction activity in the Saramaka territory could affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that article 21 of the Convention should not be interpreted in a way that prevents the state from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory. The court observed that this natural resource is likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka community and, consequently, their members. That is, the extraction of one natural resource is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival of the Saramakas.

265. Nevertheless, the court said that protection of the right to property under article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. The court also recognised the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival but that these property rights, like many other rights recognised in the Convention, are subject to certain limitations and restrictions. In this sense, article 21 of the Convention states that the 'law may subordinate [the] use and enjoyment [of property] to the interest of society'. But the Court also said that it had previously held that, in accordance with article 21 of the Convention, a state may restrict the use and enjoyment of the right to property where the restrictions are: (a) previously established by law; (b) necessary;

(c) proportional, and (d) with the aim of achieving a legitimate objective in a democratic society.[148]

266. The *Saramaka* case is analogous to the instant case with respect to ruby mining. The IACtHR analysed whether gold-mining concessions within traditional Saramaka territory have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka community. According to the evidence submitted before the court, the Saramaka community, traditionally, did not use gold as part of their cultural identity or economic system. Despite possible individual exceptions, the Saramaka community do not identify themselves with gold nor have demonstrated a particular relationship with this natural resource, other than claiming a general right to 'own everything, from the very top of the trees to the very deepest place that you could go under the ground'. Nevertheless, the court stated that, because any gold mining activity within Saramaka territory will necessarily affect other natural resources necessary for the survival of the Saramakas, such as waterways, the state has a duty to consult with them, in conformity with their traditions and customs, regarding any proposed mining concession within Saramaka territory, as well as allow the members of the community to reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project. The same analysis would apply regarding concessions in the instant case of the Endorois.

267. In the instant case of the Endorois, the respondent state has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community. The African Commission is aware that the Endorois do not have an attachment to ruby. Nevertheless, it is instructive to note that the African Commission decided in the *Ogoni* case that the right to natural resources contained within their traditional lands vested in the indigenous people. This decision made clear that a people inhabiting a specific region within a state can claim the protection of article 21.[149] Article 14 of the African Charter indicates that the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.

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[148] See case of the *Indigenous YakyeAxa Community,* paras 144-145 citing *(mutatis mutandi).* Case of *Ricardo Canese v Paraguay* merits, *reparations and costs.* judgment of August 31, 2004. Series C No 111, para 96; Case of *Herrera Ulloa v Costa Rica. Preliminary Objections, merits, reparations and costs.* judgment of July 2, 2004. Series C No 107, para 127, and case of *Ivcher Bronstein v Peru merits, reparations and costs.* judgment of February 6, 2001. Series C No 74. para 155. See also, case of the *Indigenous Sawhoyamaxa Community,* at para 137.

[149] The *Ogoni* Case (2001), paras 56-58.

268. As far as the African Commission is aware, that has not been done by the respondent state. The African Commission is of the view the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the respondent state. Article 21(2) also concerns the obligations of a state party to the African Charter in cases of a violation by spoliation, through provision for restitution and compensation. The Endorois have never received adequate compensation or restitution of their land. Accordingly, the respondent state is found to have violated article 21 of the Charter.

Alleged violation of article 22

269. The complainants allege that the Endorois' right to development have been violated as a result of the respondent state's creation of a game reserve and the respondent state's failure to adequately involve the Endorois in the development process.

270. In rebutting the complainants' allegations, the respondent state argues that the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at the risk of others. It argues that the Baringo and Koibatek county councils are not only representing the Endorois, but other clans of the Tugen tribe, of which the Endorois are only a clan. However, to avoid the temptation of one community domineering the other, the Kenyan political system embraces the principle of a participatory model of community through regular competitive election for representatives in those councils. It states that elections are by adult suffrage and are free and fair.

271. The respondent state also submits it has instituted an ambitious programme for universal free primary education and an agricultural recovery programme which is aimed at increasing the household incomes of the rural poor, including the Endorois; and initiated programmes for the equitable distribution of budgetary resources through the Constituency Development Fund, Constituency Bursary Funds, Constituency Aids Committees and District Roads Board.

272. It adds that for a long time, tourism in Kenya has been on the decline. This, it argues, has been occasioned primarily by the ethnic disturbance in the Coast and the Rift Valley provinces which are the major tourist circuits in Kenya, of which the complainants land falls and therefore it is expected that the Country Councils of Baringo and Koibatek were affected by the economic down turn.

273. Further rebutting the allegations of the complainants, the respondent state argues that the complainants state in paragraph 239 of their merits brief that due to lack of access to the salts licks and their usual pasture, their cattle died in large numbers, thereby

making them unable to pay their taxes and that, consequently, the government took away more cattle in tax; and that they were also unable to pay for primary and secondary education for their children is utterly erroneous as tax is charged on income. According to the respondent state it argues that if the Endorois were not able to raise income which amounts to the taxable brackets from their animal husbandly, they were obviously not taxed. The respondent state adds that this allegation is false and intended to portray the government in bad light.

274. The respondent state argues that the complainants allege that the consultations that took place were not in 'good faith' or with the objective of achieving agreement or consent, and furthermore that the respondent state failed to honour the promises made to the Endorois community with respect to revenue sharing from the game reserve, having a certain percentage of jobs, relocation to fertile land and compensation. The respondent state accuses the complainants of attempting to mislead the African Commission because the county council collects all the revenues in the case of game reserves and such revenues are ploughed back to the communities within the jurisdictions of the county council through development projects carried out by the county council.

275. Responding to the allegation that the game reserve made it particularly difficult for the Endorois to access basic herbal medicine necessary for maintaining a healthy life, the respondent state argues that the prime purpose of gazetting the National Reserve is conservation. Also responding to the claim that the respondent state has granted several mining and logging concessions to third parties, and from which the Endorois have not benefited, the respondent state asserts that the community has been well informed of those prospecting for minerals in the area. It further states that the community's mining committee had entered into an agreement with the Kenyan company prospecting for minerals, implying that the Endorois are fully involved in all community decisions.

276. The respondent state also argues that the community is represented in the county council by its elected councillors, therefore presenting the community the opportunity to always be represented in the forum where decisions are made pertaining to development. The respondent state argues that all the decisions complained about have had to be decided upon by a full council meeting.

277. The African Commission is of the view that the right to development is a two-pronged test, that it is both *constitutive* and *instrumental*, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes

the complainants' arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.[150]

278. In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states '... the state or any other authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available'. Freedom of choice must be present as a part of the right to development.[151]

279. The Endorois believe that they had no choice but to leave the Lake and when some of them tried to reoccupy their former land and houses they were met with violence and forced relocations. The complainants argue this lack of choice directly contradicts the guarantees of the right to development. The African Commission also notes a report produced for the UN Working Group on Indigenous Populations requiring that 'indigenous peoples are not coerced, pressured or intimidated in their choices of development'.[152] Had the respondent state allowed conditions to facilitate the right to development as in the African Charter, the development of the game reserve would have increased the capabilities of the Endorois, as they would have had a possibility to benefit from the game reserve. However, the forced evictions eliminated any choice as to where they would live.

280. The African Commission notes the respondent state's submissions that the community is well represented in the decision making structure, but this is disputed by the complainants. In paragraph 27 of the complainants' merits brief, they allege that the Endorois have no say in the management of their ancestral land. The EWC, the representative body of the Endorois community, have been refused registration, thus denying the right of the Endorois to fair and

[150] Arjun Sengupta, 'Development Cooperation and the Right to Development', Francois-Xavier Bagnoud Centre Working Paper No 12, (2003), available at www.hsph.harvard.edu/fxbcenter/working_papers.htm. See also UN Declaration on the Right to Development, UN GAOR, 41st sess, Doc A/RES/41/128 (1986), art 2.3, which to refers to 'active, free and meaningful participation in development'.

[151] Arjun Sengupta, 'The Right to Development as a Human Right' Francois-Xavier Bagnoud Centre Working Paper No 8, (2000), page 8, available at http://www.hsph.harvard.edu/fxbcenter/working_papers.htm 2000.

[152] Antoanella-Iulia Motoc and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that they would serve as a framework for the drafting of a legal commentary by the Working Group on this concept. UN Doc E/CN.4/Sub.2/AC.4/2004/4 (2004), para 14(a).

legitimate consultation. The complainants further allege that the failure to register the EWC has often led to illegitimate consultations taking place, with the authorities selecting particular individuals to lend their consent 'on behalf' of the community.

281. The African Commission notes that its own standards state that a government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.[153] The African Commission agrees with the complainants that the consultations that the respondent state did undertake with the community were inadequate and cannot be considered effective participation. The conditions of the consultation failed to fulfil the African Commission's standard of consultations in a form appropriate to the circumstances. It is convinced that community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the game reserve.

282. Furthermore, the community representatives were in an unequal bargaining position, an accusation not denied or argued by the respondent state, being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the respondent state to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community. It also agrees with the complainants that the inadequacy of the consultation undertaken by the respondent state is underscored by Endorois' actions after the creation of the game reserve. The Endorois believed, and continued to believe even after their eviction, that the game reserve and their pastoralist way of life would not be mutually exclusive and that they would have a right of re-entry on to their land. In failing to understand their permanent eviction, many families did not leave the location until 1986.

283. The African Commission wishes to draw the attention of the respondent state that article 2(3) of the UN Declaration on Development notes that the right to development includes 'active, free and meaningful participation in development'.[154] The result of development should be empowerment of the Endorois community. It is not sufficient for the Kenyan Authorities merely to give food aid to the Endorois. The capabilities and choices of the Endorois must improve in order for the right to development to be realised.

[153] Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (twenty-eighth session, 2003). See also ILO Convention 169 which states: 'Consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.'

[154] UN Declaration on the Right to Development, UN GAOR, 41st sess., Doc A/RES/41/128 (1986), article 2.3. (hereinafter Declaration on Development).

284. The case of the *YakyeAxa* is instructive. The Inter-American Court found that the members of the YakyeAxa community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that were the subject matter of proceedings in front of the court as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim.

285. The IACtHR noted that, according to statements from members of the YakyeAxa community during the public hearing, the members of that community might have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the YakyeAxa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.

286. The precariousness of the Endorois' post-dispossession settlement has had similar effects. No collective land of equal value was ever accorded (thus failing the test of 'in accordance with the law', as the law requires adequate compensation). The Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism, especially in view of the strict prohibition on access to the Lake area's medicinal salt licks or traditional water sources. Few Endorois got individual titles in the Mochongoi Forest, though the majority live on the arid land on the outskirts of the Reserve.[155]

287. In the case of the YakyeAxa community, the court established that the state did not guarantee the right of the members of the YakyeAxa community to communal property. The court deemed that this had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence, as well as to the use and enjoyment of the natural resources necessary to

[155] See UN Doc E/C.12/1999/5. The right to adequate food (art 11), (20th session, 1999), para 13, and UN Doc HRI/GEN/1/Rev.7 at 117. The right to water (arts 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), (29th session 2002), para 16. In these documents the arguments is made that in the case of indigenous peoples, access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water. In this regard, the Committee on Economic, Social and Cultural Rights has highlighted the special vulnerability of many groups of indigenous peoples whose access to ancestral lands has been threatened and, therefore, their possibility of access to means of obtaining food and clean water.

obtain clean water and to practice traditional medicine to prevent and cure illnesses.

288. In the instant communication in front of the African Commission, video evidence from the complainants shows that access to clean drinking water was severely undermined as a result of loss of their ancestral land (Lake Bogoria) which has ample fresh water sources. Similarly, their traditional means of subsistence — through grazing their animals — has been curtailed due to lack of access to the green pastures of their traditional land. Elders commonly cite having lost more than half of their cattle since the displacement.[156] The African Commission is of the view that the respondent state has done very little to provide necessary assistance in these respects.

289. Closely allied with the right to development is the issue of participation. The IACtHR has stated that in ensuring the effective participation of the Saramaka people in development or investment plans within their territory, the state has a duty to actively consult with the said community according to their customs and traditions. This duty requires the state to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

290. In the instant communication, even though the respondent state says that it has consulted with the Endorois community, the African Commission is of the view that this consultation was not sufficient. It is convinced that the respondent state did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve and commencing their eviction. The respondent state did not impress upon the Endorois any understanding that they would be denied all rights of return to their land, including unfettered access to grazing land and the medicinal salt licks for their cattle. The African Commission agrees that the complainants had a legitimate expectation that even after their initial eviction, they would be allowed access to their land for religious ceremonies and medicinal purposes — the reason, in fact why they are in front of the African Commission.

291. Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

292. From the oral testimony and even the written brief submitted by the complainants, the African Commission is informed that the

[156] See, for example, the affidavit of Richard Yegon, one of the Elders of the Endorois community.

Endorois representatives who represented the community in discussions with the respondent state were illiterates, impairing their ability to understand the documents produced by the respondent state. The respondent state did not contest that statement. The African Commission agrees with the complainants that the respondent state did not ensure that the Endorois were accurately informed of the nature and consequences of the process, a minimum requirement set out by the Inter-American Commission in the *Dann* case.[157]

293. In this sense, it is important to note that the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that: '(w)herever (large-scale projects) occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them. (…) The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence'.[158] Consequently, the UN Special Rapporteur determined that '(f)ree, prior and informed consent is essential for the (protection of) human rights of indigenous peoples in relation to major development projects'.[159]

294. In relation to benefit sharing, the IACtHR in the *Saramaka* case said that benefit sharing is vital both in relation to the right to development and by extension the right to own property. The right to development will be violated when the development in question decreases the well-being of the community. The African Commission

[157] In *Mary and Carrie Dann v USA*, the IAcmHR noted that convening meetings with the community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation. To have a process of consent that is fully informed 'requires at a minimum that *all* of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.' *Mary and Carrie Dann v USA* (2002).

[158] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc, E/CN, 7/2003/90, 2.

[159] The UNCERD has observed that '[a]s to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought'. *Cf.* UNCERD, *Consideration of Reports submitted by states parties under article 9 of the Convention, Concluding Observations on Ecuador (Sixty Second session, 2003)*, UN Doc CERD/C/62/CO/2, 2 June 2003, para 16.

similarly notes that the concept of benefit-sharing also serves as an important indicator of compliance for property rights; failure to duly compensate (even if the other criteria of legitimate aim and proportionality are satisfied) result in a violation of the right to property.

295. The African Commission further notes that in the 1990 'African Charter on Popular Participation in Development and Transformation' benefit sharing is key to the development process. In the present context of the Endorois, the right to obtain 'just compensation' in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits made as a result of a restriction or deprivation of their right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

296. In this sense, the Committee on the Elimination of Racial Discrimination has recommended not only that the prior informed consent of communities must be sought when major exploitation activities are planned in indigenous territories but also 'that the equitable sharing of benefits to be derived from such exploitation be ensured.' In the instant case, the respondent state should ensure mutually acceptable benefit sharing. In this context, pursuant to the spirit of the African Charter benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community.

297. The African Commission is convinced that the inadequacy of the consultations left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people. Resentment of the unfairness with which they had been treated inspired some members of the community to try to reclaim the Mochongoi Forest in 1974 and 1984, meet with the President to discuss the matter in 1994 and 1995, and protest the actions in peaceful demonstrations. The African Commission agrees that if consultations had been conducted in a manner that effectively involved the Endorois, there would have been no ensuing confusion as to their rights or resentment that their consent had been wrongfully gained. It is also convinced that they have faced substantive losses — the actual loss in well-being and the denial of benefits accruing from the game reserve. Furthermore, the Endorois have faced a significant loss in choice since their eviction from the land. It agrees that the Endorois, as beneficiaries of the development process, were entitled to an equitable distribution of the benefits derived from the game reserve.

298. The African Commission is of the view that the respondent state bears the burden for creating conditions favourable to a people's development.[160] It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or

partake in religious ceremonies. The respondent state, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the respondent state did not adequately provide for the Endorois in the development process. It finds against the respondent state that the Endorois community has suffered a violation of article 22 of the Charter.

Recommendations

In view of the above, the African Commission finds that the respondent state is in violation of Articles 1, 8, 14, 17, 21 and 22 of the African Charter. The African Commission recommends that the respondent state:

(a) Recognise rights of ownership to the Endorois and restitute Endorois ancestral land.

(b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.

(c) Pay adequate compensation to the community for all the loss suffered.

(d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.

(e) Grant registration to the Endorois Welfare Committee.

(f) Engage in dialogue with the complainants for the effective implementation of these recommendations.

(g) Report on the implementation of these recommendations within three months from the date of notification.

2. The African Commission avails its good offices to assist the parties in the implementation of these recommendations.

[160] Declaration on the Right to Development art 3.

SUDAN

Sudan Human Rights Organisation and Another v Sudan

(2009) AHRLR 153 (ACHPR 2009)

Communication 279/03, *Sudan Human Rights v The Sudan* and 296/05 *Centre on Human Rights and Evictions v The Sudan*

Decided at the 45th ordinary session, May 2009, 28th Activity Report

Massive human rights violations in the Darfur region of Sudan

Admissibility (media reports, 92, 93; exhaustion of local remedies, remedies must be available, effective and sufficient and not unduly prolonged, 99, massive violations, 100, 101; consideration by other international body, 104-106)
Life (broad interpretation, 146; duty to respect and protect, arbitrary deprivation, 147, 148)
State responsibility (effective measures to prevent violations by non-state actors, due diligence, 148-150, 168, 179, lack of effective investigations, 153)
Mission by Commission (fact-finding report, 151, 225)
Interpretation (international standards, 155, 159, 184, 194, 204, 209)
Torture (definition, 155, 156)
Cruel, inhuman or degrading treatment (widest possible protection, 158; forced evictions, 159, 164)
Derogation (derogation not possible under the African Charter, 165, 167)
Limitations of rights (security, 166)
Personal liberty and security (deprivation of liberty, adverse effect, 171; physical security, 175; internally displaced persons, 177; sexual violence, 178)
Fair trial (right to be heard, 181, 183, 185)
Movement (187; forced displacement, 188-190, 203)
Property (destruction, 194, 201, 205)
Health (pollution, 210, 212; destruction of homes, livestock and farms, 212)
Family (forced displacement, 216)
Peoples' rights (definition of people, 223)

Peoples' right to development (nature and magnitude of violations, 224)
Remedies (duty to investigate and prosecute, 229; legislative reforms, 229; compensation, restitution, 229)

Summary of facts

1. The first communication, *Sudan Human Rights Organisation et al v The Sudan* (the SHRO case) is submitted by the Sudan Human Rights Organisation (London), the Sudan Human Rights Organisation (Canada), the Darfur Diaspora Association, the Sudanese Women Union in Canada and the Massaleit Diaspora Association (hereinafter called the complainants).

2. The complainants allege gross, massive and systematic violations of human rights by the Republic of Sudan (herein after called respondent state) against the indigenous black African tribes in the Darfur region (Western Sudan); in particular, members of the Fur, Marsalit and Zaghawa tribes.

3. The complainants allege that violations being committed in the Darfur region include large-scale killings, the forced displacement of populations, the destruction of public facilities, properties and disruption of life through bombing by military fighter jets in densely populated areas.

4. The complainants allege that the Darfur region has been under a state of emergency since the government of General Omar Al-Bashir seized power in 1989. They allege further that this situation has given security and paramilitary forces a free hand to arrest, detain torture and carry out extra-judicial executions of suspected insurgents.

5. The complainants also allege that nomadic tribal gangs of Arab origin, alleged to be members of the militias known as the *Murhaleen* and the *Janjaweed* are supported by the respondent state.

6. The complainants allege further that an armed group known as the Sudan Liberation Movement/Army issued a political declaration on 13 March 2003 and clashed with respondent state's armed forces. The respondent state launched a succession of human rights violations against suspected insurgents, using methods such as extra-judicial executions, torture, rape of women and girls, arbitrary arrests and detentions.

7. The complainants also contend that hundreds of people from the aforementioned indigenous African tribes have been summarily executed by the respondent state's security forces and by allied militia, adding that detainees are usually tried by special military

courts with little regard to international standards or legal protection.

8. The complainants allege that the above said actions of the Respondent State violate articles 2, 3, 4, 5, 6, 7(1), 9, 12(1), (2) and (3) and 13(1) and (2) of the African Charter on Human and Peoples' Rights.

9. The second communication, *Centre for Housing Rights and Evictions v The Sudan* (the COHRE case), is submitted by an NGO based in Washington DC (the complainant) against the Republic of Sudan (the respondent state). The communication is based on almost similar allegations as in the SHRO case.

10. The complainant states that Darfur is the largest region in the respondent state, divided into south, west and north administrative zones and covers an area of about 256 000 square kilometers in size and has an estimated population of five million (5 000 000) persons; that in February 2003 fighting intensified in the Darfur region following the emergence of two armed groups, the Sudan Liberation Army (SLA) and the Justice Equality Movement (JEM), which come primarily from the Fur, Zaghawa and Masaalit tribes. The two armed groups' political demand essentially is for the respondent state to address the marginalisation and underdevelopment of the region.

11. The complainant alleges that in response to the emergence of these groups and the armed rebellion, the respondent state formed, armed and sponsored an Arab militia force known as the *Janjaweed* to help suppress the rebellion.

12. The complainant alleges further that the respondent state is involved at the highest level in the recruitment, arming and sponsoring of the *Janjaweed* militia. The complainant cites a directive dated 13 February 2004, from the office of the sublocality in North Darfur directing all security units within the locality to allow the activities of the *Janjaweed* under the command of Sheikh Musa Hilal to secure its 'vital needs'. The complainant also claims that military helicopters from the respondent state provide arms and supplies of food to the *Janjaweed*.

13. The complainant alleges that in addition to attacking rebel targets, the respondent state's campaign has targeted the civilian population, adding that villages, markets, and water wells have been raided and bombed by helicopter gunships and Antonov airplanes.

14. The complainant claims that residents of hundreds of villages have been forcibly evicted, their homes and other structures totally or partially burned and destroyed. That thousands of civilians in Darfur have been killed in deliberate and indiscriminate attacks and more than a million people have been displaced.

Complaint and prayers

15. The complainant in the *COHRE* case alleges that the respondent state has violated articles 4, 5, 6, 7, 12(1), 14, 16, 18(1) and 22 of the African Charter. It requests the African Commission to hold the respondent state liable for the human rights violations in the Darfur region.

16. The complainant also urges the African Commission to place the violations described in the communication, before the Assembly of Heads of State and Government of the African Union for consideration under article 58 of the African Charter; that the African Commission, should undertake an in-depth study of the situation in Darfur and make a factual report with findings and recommendations as mandated in article 58(2) of the African Charter; and that the African Commission should adopt provisional measures in view of the urgency required in this communication.

Procedure

17. The *SHRO* case was received by post at the Secretariat of the African Commission (the Secretariat) on 18 September 2003.

18. On 10 October 2003, the Secretariat acknowledged receipt of the complaint and indicated that it would be considered on seizure by the African Commission during its 34th ordinary session held from 6 to 20 November 2003, in Banjul, The Gambia.

19. During its 34th ordinary session, the African Commission examined the communication and decided to be seized of it.

20. On 2 December 2003, the Secretariat notified the respondent state of this decision, sent a copy of the complaint, and requested it to send its arguments on admissibility within three months.

21. This decision was also conveyed to the complainants by letter dated 2 December 2003.

22. On 29 March 2004, the respondent state informed the Secretariat that due to various reasons, it would not be able to present its submissions on admissibility and promised to send the said observations at the earliest time possible.

23. During its 35th ordinary session which was held in Banjul, The Gambia in May/June 2004, the African Commission deferred consideration on the admissibility of the communication to its 36th ordinary session at the respondent state's request.

24. In the meantime, during the 35th ordinary session the complainants delivered to the Secretariat documents containing supplementary information relevant to the complaint.

25. On 6 July 2004, the Secretariat informed both parties about its decision to defer the communication and reminded the respondent

state to submit its arguments on admissibility. At the same time, the Secretariat conveyed the complainants' supplementary submissions to the respondent state, and also notified the complainants about the respondent state's request for a deferral of consideration on the admissibility.

26. Seizing the opportunity of a Commission fact finding mission to the respondent state, the Secretariat sent another set of the communication documents to the respondent state.

27. During its 36th ordinary session, held from 23 November to 7 December 2004 in Dakar, Senegal, the African Commission considered the complaint and decided to defer its decision on admissibility to its 37th ordinary session. The respondent state had submitted its arguments on admissibility during the said session.

28. On 2 December 2004, the Secretariat of the African Commission acknowledged receipt of the respondent state's submissions.

29. On 23 December 2004, the Secretariat informed the parties about the African Commission's decision.

30. During its 37th ordinary session, which took place from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission considered the complaint and, upon request from the complainants, deferred its decision on admissibility to its 38th ordinary session.

31. During the 38th ordinary session held from 21 November to 5 December 2006, the African Commission considered the case and decided to postpone its consideration to the 39th ordinary session.

32. On 16 December 2005, the Secretariat of the African Commission notified this decision to the parties. The complainants were requested to submit their rejoinder to the respondent state's arguments.

33. During its 39th ordinary session held from 11 to 25 May 2006, in Banjul, The Gambia, the Commission considered the communication and declared it admissible. It further decided to consolidate the communication with the *COHRE* case.

34. By *note verbale* of 14 July 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to submit their arguments on the merits within two months.

35. The *COHRE* case was received at the Secretariat of the African Commission by e-mail on 6 January 2005.

36. On 11 January 2005, the Secretariat wrote to the complainant acknowledging receipt of the complaint and informing it that it will be considered on seizure at the Commission's 37th ordinary session.

37. At its 37th ordinary session held in Banjul, The Gambia from 27 April to 11 May 2005, the African Commission considered the communication and decided to be seized thereof.

38. On 24 May 2005, the Secretariat sent a copy of the communication to the respondent state, notified it of the decision of the Commission, and requested it to send its arguments on admissibility within three months of the notification. By letter of the same date, the complainant was notified of the decision and asked to submit its arguments on admissibility within three months of notification.

39. By letter of 15 June 2005, the complainant submitted its arguments on admissibility.

40. On 7 July 2005, the Secretariat acknowledged receipt of the complainant's submission on admissibility and transmitted them to the respondent state and requested the latter to submit its arguments before 24 August 2005.

41. By *note verbale* dated 2 September 2005, the respondent state was reminded to send its arguments on admissibility.

42. On 9 November 2005, the Secretariat received a *note verbale* from the respondent state submitting its argument on admissibility.

43. By *note verbale* of 11 November, 2005, the Secretariat acknowledged receipt of the respondent state's submission.

44. At its 38th ordinary session held from 21 November to 5 December 2005, the African Commission deferred consideration on the admissibility of the communication to its 39th ordinary session.

45. By *note verbale* of 15 December 2005 and by letter of the same date, the Secretariat notified both parties of the African Commission's decision.

46. By letter of 9 March 2006, the Secretariat forwarded the arguments on admissibility of the state to the complainant.

47. On 20 March 2006, the Secretariat received a supplementary submission on admissibility from the complainant in response to the state's submission.

48. By letter of 27 March 2006, the Secretariat acknowledged receipt of the complainant's supplementary submissions on admissibility.

49. By *note verbale* of 27 March 2006, the Secretariat transmitted the complainant's supplementary submission on admissibility to the respondent state and requested the latter to respond before 15 April 2006.

50. At its 39th ordinary session held from 11 to 25 May 2006, the African Commission considered the communication and declared it

admissible. The Commission decided to consolidate the communication with the *SHRO* case.

51. By *note verbale* dated 29 May 2006 and by letter of the same date, both parties were notified of the Commission's decision and requested to make submissions on the merits before 29 August 2006.

52. On 23 August 2006, the Secretariat received the complainant's submissions on the merits of the communication. On 1 October 2006, the Secretariat acknowledged receipt of the complainant's submissions.

53. On 8 October 2006, the Secretariat forwarded the complainant's submissions to the respondent state and reminded the latter to make its submissions on the merits before 31 October 2006.

54. At its 40th ordinary session held in Banjul, The Gambia, from 15 to 29 November 2006, the African Commission considered the communication and deferred it to its 41st ordinary session pending the respondent state's response.

55. By *note verbale* of 4 January 2007 and by letter of the same date, both parties were notified of the Commission's decision.

56. By *note verbale* of 11 April 2007, the Secretariat reminded the respondent state to submit its arguments on the merits.

57. On 25 May 2007, during the 41st ordinary session, the Secretariat received the state's submissions on the merits.

58. At its 41st ordinary session held in Accra, Ghana, the Commission considered the communication and deferred it to its 42nd ordinary session to allow the Secretariat to translate the submissions and prepare a draft decision.

59. By *note verbale* of 10 July 2007 and letter of the same date both parties were notified of the Commission's decision.

60. At its 42nd ordinary session held from 15 to 28 November 2007, in Brazzaville, Congo, the Commission considered the communication and deferred it to its 43rd ordinary session because the respondent state made additional submissions on the matter during the session.

61. At its 43rd ordinary session held in Ezulwini, the Kingdom of Swaziland, the commission deferred the communication to its 44th ordinary session to allow the Secretariat to prepare a draft decision.

62. At its 44th ordinary session in Abuja, Nigeria, the Commission considered the communication and deferred further consideration to the 45th ordinary session due to time constraints.

Law

Submissions on admissibility

Complainants' submissions on admissibility

The *SHRO* Case

63. The complainants submit that acts of violence were committed in a discriminatory manner against populations of black African origin, in the Darfur region, namely the Fur, Massaleit and Zaggawa tribes.

64. They add that the respondent state is 'governed by a military regime, which does not attach the required importance to normal procedures under the Rule of law or respect for the country's institutions,' hence citizens, groups and organizations cannot bring issues of human rights violations before independent and impartial courts, because of the 'inevitable harassment, threats, intimidations and disruption of normal life by State security agents'.

65. The complainants submit that the respondent state continues to hold Mr Hassan El Turabi, leader of the political party National Popular Congress, in detention, in spite of the rulings by the Constitutional Court which gave instructions for his release; that the Darfur region has been placed under a state of emergency since the 1989 *coup d'état*, and that the situation is deteriorating very rapidly and in a highly dangerous manner in a country which is multi-denominational, multi-cultural and multi-ethnic.

The *COHRE* case

66. The complainant avers that the respondent state has committed serious and massive violation of human rights. The complainant argues that the violations are ongoing since 2003. It argues that the communication has been submitted to the African Commission within a reasonable period of time.

67. The complainant argues further that the victims of forced evictions and other accompanying human rights violations in the Darfur Region cannot avail themselves of local remedies due to several reasons, including the fact that:

(1) the victims are increasingly being displaced into remote regions or across international frontiers;

(2) the respondent state has not created a climate of safety necessary for victims to avail themselves of local remedies; and

(3) the respondent state is well aware of the series of serious and massive human rights violations occurring in Darfur and has taken little or no steps to remedy those violations. Consequently, these impediments render local remedies unavailable to the victims.

68. The complainant therefore urges that the communication be declared admissible because domestic remedies are not available.

Respondent state's submissions on admissibility

69. The respondent state denies all the allegations advanced by the complainants in the *SHRO* case. The respondent state submits that the conflict in the Darfur region is a result of its geographical location. It argues that the instability in neighbouring countries has negative repercussions on the respondent state.

70. The respondent state admits that the conflict in Southern Sudan, which lasted for years had affected all the regions of the country at varying degrees. It states that South Darfur, which borders Southern Sudan, has been affected by armed operation and the massive exodus of the population running away from the fighting and that the three Darfur regions have also been affected by the situation in Chad, Central African Republic and the Democratic Republic of Congo through the introduction of arms from these countries and the influx of hundreds of tribes with kinship links in the respondent state.

71. The respondent state submits that armed conflicts in neighbouring states have contributed to the emergence of armed rebel groups which carry out plunder and theft. The respondent state submits further that it has taken measures to restore stability, bring criminals to courts in accordance with the law and returned stolen property.

72. The respondent state argues further that the complainants have not exhausted local remedies. It states that there has not been any report/complaint to the police, the courts, the National Council or to the Human Rights Consultative Council. It submits further that the complaint does not conform to articles 56(2) and 56(4) of the African Charter, because it is based on erroneous or imaginary facts which have nothing to do with the respondent state.

73. The respondent state claims that the communication has been overtaken by events since several of the claims were addressed by the President of the respondent state on 9 March 2004, when he granted general amnesty to those who surrendered their arms. That the respondent state signed peace agreements at Abeche and N'djamena; launched the reconstruction of infrastructure destroyed by the rebels; allowed international aid organizations to intervene on the ground; and allowed the return of internally displaced persons. It created an independent Commission of Inquiry on the human rights violations, and convened a meeting for all Darfurians to discuss the restoration of peace in the region. In the light of the foregoing, the respondent state denies all the allegations and declares them 'false and against the spirit of article 56 of the African Charter'.

74. With respect to the *COHRE* case, the respondent state advances two main arguments: first, that local remedies have not been exhausted and secondly, that the communication has been settled by other international mechanisms.

75. The respondent state argues that the complainant failed to resort to existing legal, judicial or administrative means within the respondent state to address the allegations. It argues further that under its law, the protection of human rights is regulated by three main legislative norms:

(1) International and regional human rights as ratified by the respondent state (considered to be an integral part of the Constitution),

(2) the Constitution, and

(3) State Legislation.

76. It submits that the Constitutional Court was established in 1998 and has jurisdiction to hear cases relating to the protection of human rights, guaranteed in the Constitution and other international instruments ratified. The Supreme Court, the courts of appeal, the general courts and the tribunals of 1st, 2nd and 3rd appeals all have jurisdictions, depending on the location, to deal with specific issues. That the President of the Supreme Court can establish specialized courts to deal with specific situations and to hear cases on human rights violations in the three regions of Darfur.

77. The respondent state argues that it had introduced legal and judicial procedures to punish perpetrators of alleged human rights abuses in Darfur. These mechanisms include: the National Commission of Enquiry on the violation of human rights in Darfur under the chairmanship of the former Vice-President of the Supreme Court, comprised of human rights lawyers and activists. It adds further that the National Commission submitted its report to the President of the Republic in January 2005. Three committees were established based on the recommendations of the report: namely, the Judiciary Committee of Enquiry to investigate violations, Committee for compensation and Committee for the settlement of priority cases of property ownership.

78. Therefore, the respondent state submits that the communication does not comply with article 56(5) of the African Charter.

79. The respondent state submits further that the communication was submitted after being settled by UN mechanisms. It argues that the United Nations and the UN Security Council adopted resolutions 1590, 1591 and 1592 concerning the situation in Darfur, which are currently being implemented. In April 2005 the Commission on Human Rights of the UN Economic, Social and Cultural Council, also adopted a resolution concerning the human rights violations in Sudan. As a result, the respondent state submits that a Special Rapporteur was

assigned to look into the human rights situation. She recently visited Sudan, specifically the Darfur region.

80. The respondent state argues therefore that, the communication is inadmissible under article 56(7) of the African Charter.

Complainant's supplementary submission in response to respondent state's submission on admissibility

81. In a supplementary brief on admissibility the complainant submits that, taken together, the forced evictions and accompanying human rights violations amount to serious and massive violations of human rights protected by the African Charter.

82. Complainant cites a 2006 Report by the UN Special Rapporteur on the human rights situation in Sudan which found that 'the human rights situation worsened from July 2005 … and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan.' The report adds that the cases prosecuted before the Special Criminal Court on the events in Darfur 'did not reflect the major crimes committed during the height of the Darfur crisis' and 'only one of the cases involved charges brought against a high-ranking official, and he was acquitted.'

83. Consequently, the complainant argues that, the domestic remedies, cited by the respondent state, are not effective, nor sufficient, since they offer little prospect of success. They are incapable of redressing the complaints.

84. The complainant submits that the special criminal tribunals 'may just be a tactic by the Sudanese government to avoid prosecution by the International Criminal Court'; that such tribunals are 'doomed to failure' because they lack 'serious legal reforms ensuring independence of the judiciary.' Hence, the complainant submit, the respondent state has failed to bring 'an end to the current climate of intimidation', thereby casting doubts about the effectiveness of domestic remedies.

85. It submits that even though the peace talks are likely to result in what could be considered injunctive relief by halting further human rights violations, they do not provide adequate remedies for the human rights violations.

86. The complainant adds that the UN Human Rights Commission, in its resolution 2005/82, found that these domestic remedies are ineffective and insufficient in preventing, halting or remedying the forced evictions and accompanying human rights violations in Darfur.

87. Consequently, it cannot be said that these claims have 'been settled' as required by article 56(7) of the African Charter.

88. The complainant concludes that the present communication satisfies the requirements of article 56 of the African Charter.

African Commission's decision on admissibility

89. Admissibility of communications under the African Charter is governed by the conditions set out in article 56. The complainants argue that the communication complies with all the requirements under article 56 of the Charter. The respondent state argues that the communications be declared inadmissible for not meeting the requirements of article 56(2), (4), (5) and (7) of the African Charter.

90. Article 56(2) requires communications to be compatible with the Constitutive Act or the African Charter. The respondent state did not explain how the communication is incompatible with either instrument. The mere submission of a communication by a Complainant cannot be deemed an incompatibility under article 56(2) of the African Charter.

91. Bringing communications against state parties to the African Charter is a means of protecting human and peoples' rights. State parties to the African Charter are duty bound to respect their obligations under both the Constitutive Act and the African Charter. Article 3(h) of the Constitutive Act enjoins African states to promote and protect human and peoples' rights in accordance with the African Charter. The African Commission does not consider the filing of complaints before it, an incompatibility with the Constitutive Act or the African Charter. It therefore finds that article 56(2) has been complied with.

92. Article 56(4) stipulates that communications should not be based exclusively on news disseminated through the mass media. The present communications are supported by UN reports as well as reports and press releases of international human rights organisations. These communications are not based exclusively on mass media reports. The Darfur crisis has attracted wide international media attention. It would be impractical to separate allegations contained in the communications from the media reports on the conflict and the alleged violations.

93. In its decision declaring *Jawara v The Gambia* (the *Jawara* case)[1] admissible, the Commission stated that

> [w]hile it would be dangerous to rely exclusively on news disseminated from the mass media, it would be equally damaging if the Commission were to reject a communication because some aspects of it are based on news disseminated through the mass media ... There is no doubt that the media remains the most important, if not the only source of information. It is common knowledge that information on human rights violation is always gotten from the media ... The issue therefore should not be whether the information was gotten from the media, but whether the information is correct ...

1 Communication 147/96 [(2000) AHRLR 107 (ACHPR 2000)].

The African Commission therefore finds further that the communications comply with article 56(4).

94. With respect to article 56(5), the respondent state argues that no attempt was made to approach various internal remedies. The complainants, on the other hand, argue that article 56(5) does not apply to the communications due to the 'serious, massive and systematic' nature of the alleged violations by the respondent state. They submit that such violations are incapable of being remedied by domestic remedies.

95. Article 56(5) of the African Charter provides that communications relating to human and peoples' rights referred to in article 55 received by the African Commission shall be considered if they 'are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

96. The issue to be resolved is whether the local remedies were capable of addressing the violations alleged by the complainants.

97. The African Commission has previously decided on the question of remedies with respect to cases of serious or massive violations of human rights. In *Free Legal Assistance Group and Others v Zaire*, the Commission stated that:

> In the light of its duty to ensure the protection of human and peoples' rights ... the Commission cannot hold the requirement of exhaustion of local remedies to apply literally in cases where it is impractical or undesirable for the complaint [s] to seize the domestic courts in the case of each individual complaint. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable.[2]

98. The respondent state argues that the remedies were not only available, but effective and sufficient, and that the complainant did not bother to access them to seek justice for the victims. The complainants cite several reports which indicate various cases of intimidation, displacement, harassment, sexual and other kinds of violence, which according to the complainant may not be dealt with appropriately through local remedies.

99. The African Commission has often stated that a local remedy must be available, effective and sufficient. All three criteria must be present for the local remedy envisaged in article 56(5) to be considered worthy of pursuing. In the *Jawara* case[3] the African Commission held that a remedy is considered available if the petitioner can pursue it without impediment. It is deemed effective if it offers a prospect of success. It is found sufficient if it is capable of redressing the complaint.

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2 Communications 25/89, 47/90, 56/91 100/93 [(2000) AHRLR 74 (ACHPR 1995)].

3 N 1 above.

100. In the present communication, the scale and nature of the alleged abuses, the number of persons involved *ipso facto* makes local remedies unavailable, ineffective and insufficient. This Commission has held in *Malawi African Association and Others v Mauritania*[4] that it

> does not believe that the condition that internal remedies must have been exhausted can be applied literally to those cases in which it is neither practicable nor desirable for the Complainants or the victims to pursue such internal channels of remedy in every case of violation of human rights. Such is the case where there are many victims. Due to the seriousness of the human rights situation and the large number of people involved, such remedies as might theoretically exist in the domestic courts are as a practical matter unavailable.[5]

101. Such is the case with the situation in the Darfur region, where tens of thousands of people have allegedly been forcibly evicted and their properties destroyed. It is impracticable and undesirable to expect these victims to exhaust the remedies claimed by the state to be available.

102. The African Commission, considering that the alleged violations *prima facie* constitute 'serious and massive violations', finds that under the prevailing situation in the Darfur, it would be impractical to expect the complainants to avail themselves of domestic remedies, which, are in any event, ineffective. Had the domestic remedies been available and effective, the respondent state would have prosecuted and punished the perpetrators of the alleged violations, which it has not done. The Commission finds that there were no remedies and therefore the criteria under article 56(5) do not apply to the complainants.

103. The respondent state argued that the violations have been settled by other international mechanisms and cites article 56(7) of the Charter.

104. The African Commission wishes to state that a matter shall be considered settled within the context of article 56(7) of the African Charter, if it was settled by any of the UN human rights treaty bodies or any other international adjudication mechanism, with a human rights mandate. The respondent state must demonstrate to the Commission the nature of remedies or relief granted by the international mechanism, such as to render the complaints *res judicata*, and the African Commission's intervention unnecessary.

105. The African Commission, while recognising the important role played by the United Nations Security Council, the Human Rights Council (and its predecessor, the Commission on Human Rights) and other UN organs and agencies on the Darfur crisis, is of the firm view that these organs are not the mechanisms envisaged under article

4 Communications 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 [(2000) AHRLR 149 (ACHPR 2000)].

5 See also *Free Legal Assistance Group and Others v Zaire*.

56(7). The mechanisms envisaged under article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations.

106. In the opinion of this Commission, the content of the current complaints were not submitted to any such bodies, by the Complainants, or any other individual or institution.

107. For these reasons, the African Commission declares both communications admissible.

Submissions on the merits

108. It should be noted that in spite of several reminders, neither the complainants nor the respondent state submitted in respect of the *SHRO* case.

109. The other complainant, COHRE, and the respondent state made submissions on the merits with respect to the *COHRE* case. The Commission will consider their submissions. Rule 120 of the Rules of Procedure of the African Commission states that '[i]f the communication is admissible, the Commission shall consider it in the light of all the information that the individual and the state party concerned has submitted in writing; it shall make known its observation on this issue ...'.

Complainant's submissions on the merits

110. The complainant submits that since February 2003, following the emergence of an armed conflict in the Darfur region, the respondent state has engaged in and continues to forcibly evict thousands of black indigenous tribes, inhabitants of the Darfur from their homes, communities and villages. The alleged forced evictions and accompanying human rights abuses recorded in this communication constitute a violation of the rights guaranteed under the African Charter to which the respondent state is a party.

111. It is submitted that the respondent state failed to respect and protect the human rights of the Darfur people. Regarding the obligation to respect, it is submitted that government forces attacked villages, injuring and killing civilians, raping women and girls, and destroying homes. The state also failed to prevent the *Janjaweed* militiamen from killing, assaulting and raping villagers, hence failing in its obligation to protect the civilian population of Darfur. The communication also alleges that at times the *Janjaweed* and government forces conducted joint attacks on villages.

112. The complainant argues further that attacks by militias prevented Darfurians from farming land, collecting fireweed for cooking, and collecting grass to feed livestock, which constitute a violation of their right to adequate food.

113. The complainant submits that the forced eviction and the accompanying human rights abuses in the Darfur region tantamount to violations of the right to life, and the right to security of the person respectively protected under articles 4 and 6 of the Charter, as thousands of people were killed, injured, and raped.

114. The complainant submits further that attacks carried out by the respondent state and the *Janjaweed* have forced thousands of people to flee their homes and habitual places of residence. According to the complainant, those actions constitute a violation of the right to freedom of residence under article 12(1) of the Charter.

115. The complainant states that the forced evictions and destruction of housing and property in the Darfur region violated the right to property enshrined in article 14 of the Charter. It is the complainant's view that those attacks cannot be compared to a lawful dispossession as they have not been carried out 'in accordance with the provisions of appropriate law …' and did not contribute to public need nor was it in the general interest of the community.

116. The communication recalls the decision of the Commission in the case of *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (the *SERAC* case)[6] where the Commission found, *inter alia*, that forced evictions by government forces and private security forces is an infringement of article 14 and the right to an adequate housing which is implicitly guaranteed by articles 14, 16 and 18(1) of the Charter.

117. Regarding the right to adequate housing, the complainant urges the Commission to draw inspiration from other international human rights law standards. It submits that the right to adequate housing is well-defined under international human rights law, including the Universal Declaration of Human Rights (article 25(1)), and the International Covenant on Economic, Social and Cultural Rights (article 11(1)), and other international human rights instruments.

118. The complainant also submits that the Committee on Economic, Social and Cultural Rights gave a precise content to the right to housing in its General Comment 4 adopted on 12 December 1991, concerning the state's obligation to respect, protect and fulfil security of tenure. In its General Comment 7, the Committee defines and proscribes the practice of forced evictions.

119. The complainant recalls that in General Comment 4, the Committee on Economic, Social Cultural Rights held that 'many of the measures required to promote the right to housing would only require the abstention by the [respondent state] from certain practices'. Furthermore, in General Comment 7, it is affirmed that: 'The state

6 Communication 155/1996 [(2001) AHRLR 60 (ACHPR 2001)].

itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.'

120. The complainant further invites the Commission to find the state in violation of article 7 as it failed to 'adequately investigate and prosecute' the authors of the forced evictions and destruction of housing.

121. The complainant submits that the African Commission relied on international law to define the right to adequate housing implied by articles 14, 16 and 18(1) of the Charter, in its decision on the *SERAC* Case.

122. The complainant also relies on the jurisprudence of the European Court of Human Rights in *Akdivar and Others v Turkey*,[7] where, in a situation similar to the one prevailing in the Darfur, that is, destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights ruled that Turkey was responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to both respect and protect human rights.

123. The complainant submits that forced evictions and destruction of housing constitute cruel or inhuman treatment prohibited by article 5 of the Charter, which is consistent with international human rights standards. It quotes the Concluding Observations on Israel in 2001 where the Committee against Torture (CAT) found that forced evictions and destruction of housing cause 'indescribable suffering to the population'. Regarding forced evictions and destruction of housing carried out by non-state actors, the communication relies on the jurisprudence of the CAT in *Hijrizi v Yugoslavia*[8] where the Committee ruled that the state is responsible for failing to protect the victims from such a violation of their human rights not to be subject to cruel, inhuman and degrading treatment or punishment under article 16 of the Convention against Torture.

124. The complainant also submits that forced evictions and accompanying human rights violations constitute violations by the respondent state of the right to adequate food and the right to water implicitly guaranteed under articles 4, 16 and 22 of the Charter as informed by standards and principles of international human rights law.

125. The complainant relies on the Committee on Economic, Social and Cultural Rights General Comment 12 of 1999, which obligates states to respect, protect and fulfil the right to adequate food, and General Comment 15 of 2003, where the Committee declares that 'the human rights to water entitles everyone to sufficient, safe,

7 No 21893/93, 1996-IV, no 15.
8 Communication 161/2000: UN Doc CAT/C/29/D/161/2000 (2 December 2002).

acceptable, physically accessible and affordable water for personal domestic uses'.

126. The complainant invites the Commission to develop further its reasoning in the *SERAC* case by holding that the right to water is also guaranteed by reading together articles 4, 16, and 22, of the African Charter. It urges the Commission to find that the respondent state has violated that right by being complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.

Respondent state's submissions on the merits

127. The respondent state avers that it is addressing the alleged human rights violations through the framework of implementation of the Darfur Peace Agreement (DPA) adopted on 5 May 2006, containing a number of remedies on the situation in Darfur, including addressing the content of the present communication. As a result of the agreement, the respondent state indicates that, it has taken a number of measures to implement the DPA and at the same time deal with the issues raised by the complainant.

128. The respondent state submits that following the signing of the Peace Agreement with the major armed movements in Darfur, the signatory partners began to implement all the components of the agreement (that is, power sharing, wealth sharing, the security arrangements, and the Darfur/Darfur Dialogue). Consequently, presidential and state decrees and decisions to establish commissions, development funds, appointing their heads and members, were issued in accordance with the provisions of the Darfur Peace Agreement.

129. The respondent state submits further that, all the major organs stipulated in the agreement were duly established, notably the Darfur Interim Authority. These organs have since begun to discharge their duties, since April 2007. In addition, the respondent state argues that the official positions allocated to Darfurians in all the organs, commissions and committees to a large extent have been occupied by them. The state added that a total of 87 posts have been filled and 16 posts, at lower levels, are yet to be filled.

130. The respondent state further indicates that with regard to the core aspect of wealth sharing, specialized mechanisms and committees, such as the Darfur Fund for Re-construction and Development and the Compensation Fund for the War Victims, as well as the Rehabilitation Commission have been formed.

131. Regarding the establishment of the Darfur Joint Assessment Mission (DJAM) responsible for defining the development needs and services in Darfur, comprising the government and the movement's representatives, donors and specialized international agencies, the

state submits that committees have conducted land surveys in Darfur with a view to defining the needs, adding that the process of data analysis and statistics in preparation for the anticipated International Conference on Development and Re-construction of Darfur sponsored by Holland, is also being undertaken.

132. With respect to the security and military arrangements, the respondent state submits that work was underway in earnest involving the government and the movements, as well as the AU mission to consolidate the cease fire to which the concerned parties are committed, as well as to make the other security arrangements, notably the specification of military positions, re-integration and demobilisation work. The respondent state added that it has presented disarmament plan regarding the *Janjaweed* militias to the African Union in July 2006. The respondent state added that a Joint Committee formed by the African Union and the government was assigned to look into the implementation of the plan in accordance with the provision of the Darfur Peace Agreement.

133. The respondent state submits further that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a considerable improvement in the security situation, adding that the state of insecurity has now been confined to some pockets of North Darfur (only 6 localities in North Darfur out of a total of 34 localities which make up the three states of Darfur).

134. The respondent state argues that it has improved the humanitarian situation and facilitated the flow of relief aid to internally displaced persons. Its fast track policy adopted in 2004, aims at removing all the administrative and procedural restrictions to the flow of relief. As such the level of coverage of relief supplies is 98% access by the needy leaving a balance of (2%) which was not covered due to insecurity in certain localities of North Darfur.

135. With respect to the voluntary repatriation of the refugees, the respondent state indicates that it has embarked on the rehabilitation of a great number of the villages in Darfur by providing basic services such as water, health, education and housing, aimed at encouraging the return of internally displaced persons, (hereinafter, IDPs) and refugees to their villages and cities. Such efforts have resulted in the return of more than 100 000 IDPs and refugees to their villages in the 3 States of Darfur. The number includes returnees to 70 villages, in West Darfur, 22 villages in South Darfur and 10 villages in North Darfur, The state adds that, a number of major roads have been re-opened in order to facilitate the return of the refugees and the IDPs, including the Nyala-Quraidha-Bram road, the Nyala-Labdu road, the Nyala-Mohajiria road, the Nyala-Dhuain road and the Kalbas-Eljinaina road.

136. The respondent state submits that, following the signing of the Peace Agreement, a great number of the IDPs have begun to exercise pasturing and farming activities. In this regard, the respondent state notes that, it has assisted in distributing agricultural inputs to the IDPs and those affected by the war. In the same context the efforts of social reconciliation have contributed to confidence building which, in turn, helped in the return of a high percentage of IDPs and the refugees to their villages.

137. The state avers that it has made contributions to humanitarian programmes in Darfur in 2006, to the tune of $110 889 000 US dollars as follows:

US Dollars
(1) Food 42 409 000
(2) Water 23 015 000
(3) Health 36 465 000
(4) Shelter 9 000 000
Total: 110 889 000

138. The respondent state believes that

> the implementation of the Darfur Peace Agreement ... could indeed help in addressing all the humanitarian issues regarding the situation in Darfur, including the communication under reference. As stated in our previous memorandum ..., the Sudanese government shall not be held responsible for the subject of the communication but it will bear its consequences by virtue of the responsibility it has towards its citizens. The Sudanese hovernment shall in this regard, be enlightening the esteemed African Commission on all the developments regarding the Communication under reference.

African Commission's decision on the merits

139. The respondent state made a general denial of the allegations and stated that due to its geographical location, the security situation in the surrounding countries had a destablilising influence on the domestic situation in the country.

140. The respondent state submits that further consideration of this communication is no longer relevant. It argues that several issues raised have been addressed by the President of the Republic. The state notes that on 9 March 2004, a general amnesty was granted to combatants who surrendered their arms, that the signing of the first peace agreement at Abeche and N'djamena, and the Abuja May 2006 Agreement, the launching of the reconstruction of infrastructure destroyed by the rebels to allow international aid organisations' assistance, the return of internally displaced persons, the creation of an independent Commission of Inquiry on the human rights violations, and the convening of a meeting for all Darfurians to discuss the restoration of peace, have all contributed to addressing the crisis in the Darfur.

141. The state notes that the commitment of the parties to the Darfur Peace and Cease-fire Agreement has brought about a

considerable improvement in the security situation, adding that the state of insecurity has now been confined to some pockets of North Darfur.

142. From the above submissions, the respondent state does not seem to be contesting the allegations made by the complainants. Rather the state notes that following the signing of the Darfur Peace Agreement, measures have been put in place by the parties to the Agreement to ensure a resolution of the crisis in Darfur, and consequently address the grievances raised in the present communication.

143. Could it be said that by not contesting the allegations, the state has conceded to violating the provisions cited by the complainants, that is, articles 4, 5, 6, 7, 9, 12(1), 14, 16, 18(1) and 22.

144. It must be noted that the respondent state has not conceded to the violations. It simply informs the Commission that the grievances highlighted in the communications will be addressed by the political developments initiated, in particular, the signing of the Darfur Peace Agreement. The African Commission will therefore have to address each and every allegation made by the complainants to ascertain their veracity.

Alleged violation of articles 4 and 5

145. With respect to allegations of violation of articles 4 and 5 of the African Charter, the complainants allege large-scale and indiscriminate killings, torture, poisoning of wells, rape, forced evictions and displacement, destruction of property, etc.

146. Article 4 of the Charter protects the right to life and provides that: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of his right'. The right to life is the supreme right of the human being. It is basic to all human rights and without it all other rights are without meaning. The term 'life' itself has been given a relatively broad interpretation by courts internationally, to include the right to dignity and the right to livelihood.

147. It is the duty of the state to protect human life against unwarranted or arbitrary actions by public authorities as well as by private persons. The duty of the state to protect the right to life has been interpreted broadly to include prohibition of arbitrary killing by agents of the state and to strictly control and limit the circumstances in which a person may be deprived of life by state authorities. These include the necessity to conduct effective official investigations when individuals have been killed as a result of the use of force by agents of the state, to secure the right to life by making effective provisions

in criminal law to deter the commission of offences against the person, to establish law-enforcement machinery for the prevention, suppression, investigation and penalisation of breaches of criminal law. In addition to the foregoing, the State is duty bound to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.[9] In *Article 19 v Eritrea*[10] this Commission noted that 'arbitrariness is not to be equated with against the law but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process ...'.

148. States as well as non-state actors, have been known to violate the right to life, but the State has dual legal obligations, to respect the right to life, by not violating that right itself, as well as to protect the right to life, by protecting persons within its jurisdiction from non-state actors. In *Zimbabwe Human Rights NGO Forum v Zimbabwe*,[11] the Commission noted that an act by a private individual or (non-state actor) and therefore not directly imputable to a state, can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence on the part of the state to prevent the violation or for not taking the necessary steps to provide the victims with reparation.[12]

149. In the present communication, the state claims it has investigated some of the allegations of extra-judicial and summary executions. The complainant submits that no effective official investigations were carried out to address cases of extrajudicial or summary executions.

150. To effectively discharge itself from responsibility, it is not enough to investigate. In *Amnesty International and Others v Sudan*[13] the African Commission held that 'investigations into extra-judicial executions must be carried out by entirely independent individuals, provided with the necessary resources, and their findings must be

9 See European Court judgments in *McCann v United Kingdom* (1995) 21 EHRR 97 and *Tanrikulu v Turkey* (1999) 30 EHRR 950.

10 Communication 275/2003 [(2007) AHRLR 73 (ACHPR 2007)].

11 Communication 245/2002 [(2006) AHRLR 128 (ACHPR 2006)].

12 In human rights jurisprudence this standard was first articulated by a regional court, the Inter- American Court of Human Rights, in looking at the obligations of the state of Honduras under the American Convention on Human Rights, *Velasquez Rodriguez*, ser C, No 4 (1988). The standard of *due diligence* has been explicitly incorporated into United Nations standards, such as the Declaration on the Elimination of Violence against Women which says that states should 'exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the state or by private persons'. Increasingly, UN mechanisms monitoring the implementation of human rights treaties, the UN independent experts, and the Court systems at the national and regional level are using this concept of due diligence as their measure of review, particularly for assessing the compliance of states with their obligations to protect bodily integrity.

13 Communications 48/90, 50/91, 52/91, 89/93 [(2000) AHRLR 297 (ACHPR 1999)].

made public and prosecutions initiated in accordance with the information uncovered.' In *Jordan v United* Kingdom[14] the European Court of Human Rights held that

> an effective official investigation must be carried out with promptness and reasonable expedition. The investigation must be carried out for the purpose of securing the effective implementation of domestic laws, which protect the right to life. The investigation or the result thereof must be open to public scrutiny in order to secure accountability. For an investigation into a summary execution carried out by a State agent to be effective, it may generally be regarded as necessary for the person responsible for the carrying out of the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence

In present communication, the state claims to have investigated the alleged abuses, put in place mechanisms to prevent further abuses and to provide remedies to victims. The question is — were all these initiatives done in accordance with international standards? Did they meet the test of effective official investigations under international human rights law?

151. The Fact-finding Report of the African Commission to the Darfur Region of Sudan[15] states that some women IDPs who were interviewed during the mission stated that

> their villages were attacked by government forces, supported by men riding horses and camels. The attacks resulted in several deaths and injury of people. Some of these women who sustained injuries, showed their wounds to the Commission. The women furthermore stated that during the attacks, a number of cases of rape were committed; some of the raped women became pregnant. Complaints were lodged at the police but were yet to be investigated. They declared that the attackers came back at night to intimidate the villagers who had not fled, accusing them of supporting the opposition. Everyone had to run away from the villages. The women indicated that they were traumatised by the violent nature of the attacks and said that they would not want to return to the villages as long as their security is not assured. They lamented lack of water and a school in the camp. The mission visited the police station to verify complaints and the level of progress made on the reported cases of rape and other offences, but the mission was unable to have access to the files as the officer in charge of the said cases was absent at the time. At one of its meetings in El Geneina, the mission was informed by the authorities of West Darfur State that even though cases of rapes were reported to the police, investigations could not be conducted because the victims could not identify their attackers. Therefore the files were closed for lack of identification of the perpetrators.

152. UN and reports of international human rights organisations attest to the fact that the respondent state has fallen short of its responsibility. For instance, in her 2006 report, the UN Special

[14] Application 24746/94, judgment of 4/8/2001, (2003) 37 EHRR 2.

[15] The African Commission conducted a Fact Finding Mission to the Darfur Region of Sudan between 8 and 18 July 2004. The report of the Mission was adopted by the African Commission during the 3rd extraordinary session, held in Pretoria, South Africa, and was published in its Activity Report presented to the AU Executive Council. See paras 86, 87, and 88, at page 20, EX.CL/364(XI)Annex III .

Rapporteur on the human rights situation in The Sudan noted that 'the human rights situation worsened from July 2005 ... and a comprehensive strategy responding to transitional justice has yet to be developed in the Sudan.' She added that the cases prosecuted before the Special Criminal Court on the events in Darfur 'did not reflect the major crimes committed during the height of the crisis in Darfur ... only one of the cases involved charges brought against a high-ranking official, and he was acquitted'.

153. The Special Rapporteur also found that 'the government has taken other justice initiatives, but they too have fallen short of producing accountability'[16] noting that 'national laws ... effectively protect Sudanese law enforcement officials from criminal prosecution [and that these laws] contribute to a climate of impunity in the Sudan.' The fact that the abuses have persisted and are ongoing since the submission of the communications clearly demonstrates a weakness in the judicial system and lack of effectiveness to guarantee effective investigations and suppression of the said violations. In the opinion of the African Commission, lack of effective investigations in cases of arbitrary killings and extra-judicial executions amount to a violation of article 4 of the African Charter.

154. Regarding the allegation of article 5, the complainants simply make a generalised allegation of human rights violations, adding that 'methods used included extra-judicial executions, torture, rape of women and girls and arbitrary arrests and detentions, evictions and burning of houses and property, etc.' Article 5 of the Charter provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited'.

155. Article 5 of the African Charter is aimed at the protection of both the dignity of the human person, and the physical and mental integrity of the individual. The African Charter does not define the meaning of the words, or the phrase 'torture or degrading treatment or punishment' However, article 1 of the United Nations Convention against Torture[17] defines, the term 'torture' to mean

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or

16 As above, para 48.

17 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA res 39/46, [annex, 39 UN GAOR Supp (No 51) at 197, UN Doc A/39/51 (1984)], entered into force 26 June 1987.

acquiescence of a public official or other person acting in an official capacity.

156. Torture thus constitutes the intentional and systematic infliction of physical or psychological pain and suffering in order to punish, intimidate or gather information. It is a tool for discriminatory treatment of persons or groups of person who are subjected to the torture by the state or non-state actors at the time of exercising control over such person or persons. The purpose of torture is to control populations by destroying individuals, their leaders and frightening entire communities.

157. The complainant has submitted that the various incidences of armed attacks by the military forces of the respondent state, using military helicopters and the *Janjaweed* militia, on the civilian population, forced eviction of the population from their homes and villages, destruction of their properties, houses, water wells, food crops and livestock, and social infrastructure, the rape of women and girls and displacement internally and outside national borders of the respondent state, constitute violation of the various cited articles of the African Charter, one of which is article 5. The totality of the aforesaid violations amount to both psychological and physical torture, degrading and inhuman treatment, involving intimidation, coercion and violence.

158. In *Media Rights Agenda v Nigeria*,[18] the Commission stated that the term 'cruel, inhuman and degrading punishment or treatment' is to be interpreted so as to extend the widest possible protection against abuse, whether physical or mental. In *Modise v Botswana*,[19] the Commission elaborated further and noted that 'exposing victims to personal sufferings and indignity violates the right to human dignity'. It went on to state that 'personal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication brought before the African Commission'.

159. Based on the above reasoning, the African Commission agrees with the UN Committee against Torture in *Hijrizi v Yugoslavia*[20] that forced evictions and destruction of housing carried out by non-state actors amounts to cruel, inhuman and degrading treatment or punishment, if the State fails to protect the victims from such a violation of their human rights. *Hijrizi v Yugoslavia* involved the forced eviction and destruction of the Bozova Glavica settlement in the city of Danilovgrad by private residents who lived nearby. The settlement was destroyed by non-Roma residents under the watchful eye of the police department, which failed to provide protection to the Romani and their property, resulting in the entire settlement being leveled and all properties belonging to its Roma residents

18 Communication 224/98 [(2000) AHRLR 262 (ACHPR 2000)].
19 Communication 97/93 [(2000) AHRLR 30 (ACHPR 2000)].
20 Communication 161/2000: UN Doc CAT/C/29/D/161/2000 (2 December 2002).

completely destroyed. Several days later the debris of Bozova Glavica was completely cleared away by municipal construction equipment, leaving no trace of the community.

160. The Committee against Torture found that the police department did not take any appropriate steps to protect the residents of Bazova Glavica, thus implying acquiescence and that the burning and destruction of their homes constituted acts of cruel, inhuman or degrading treatment or punishment within the meaning of article 16 of the Convention against Torture or other Cruel, Inhuman Degrading Treatment or Punishment.[21] Consequently, the Committee held that the Government of Serbia and Montenegro had violated article 16 of CAT by not protecting the rights of the residents of Bozova Glavica.

161. In a similar case dealing with allegations that the applicants' property had been destroyed by Turkish security forces, the European Court of Human Rights arrived at the same conclusion, that the destruction of homes and property was cruel and inhuman treatment. In *Selçuk and Asker v Turkey*,[22] the complainants were both Turkish citizens of Kurdish origin living in the village of Islamköy. In the morning of 16 June 1993, a large force of gendarmes arrived in Islamköy and set fire to the houses and other properties of the said complainants.

162. The Court held that 'even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.' The Court concluded that the treatment suffered by the applicants in this case was so severe as to constitute a violation of article 3,[23] adding that

> bearing in mind in particular the manner in which the applicants' homes were destroyed ... and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of article 3.

163. Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities are entitled to without discrimination. It is an inherent right which every state is obliged to respect and protect by all means possible.[24]

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21 Article 16 of the Convention against Torture states in part that 'Each state party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

22 European Court of Human Rights, case of *Selçuk and Asker v Turkey*, judgment of 24 April 1998, Reports 1998-II, p 900, paras 27-30.

23 Article 3 of the European Convention provides that 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

164. In the present communication, the respondent state and its agents, the *Janjaweed* militia, actively participated in the forced eviction of the civilian population from their homes and villages. It failed to protect the victims against the said violations. The respondent state, while fighting the armed groups, targeted the civilian population, as part of its counter insurgence strategy. In the opinion of the Commission this kind of treatment was cruel and inhuman and threatened the very essence of human dignity.

165. The African Commission wishes to remind state parties to the African Charter to respect human and peoples' rights at all times including in times of armed conflict. This was emphasised in *Constitutional Rights Project and Others v Nigeria* [(2000) AHRLR 227 (ACHPR 1999)] in which this Commission stated that:

> [I]n contrast to other international human rights instruments, the African Charter does not contain a derogation clause. Therefore limitation on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances. The only legitimate reasons for limitation of the rights and freedoms of the African Charter are found in article 27(2), that is, that the rights of the Charter shall be exercised with due regard to the rights of others, collective security, morality and common interest.

166. The forced eviction of the civilian population cannot be considered permissible under article 27(2) of the African Charter. Could the respondent state legitimately argue that it forcefully evicted the Darfur civilian population from their homes, villages and other places of habitual residence, on grounds of collective security, or any other such grounds or justification, if any? For such reasons to be justifiable, the Darfurian population should have benefited from the collective security envisage under article 27(2). To the contrary, the complaint has demonstrated that after eviction, the security of the IDP camps was not guaranteed. The deployment of peacekeeping forces from outside the country is proof that the respondent state failed in its obligation to guarantee security to the IDPs and the civilian population in Darfur.

167. In its decision in the *Commission nationale des droits de l'homme et des libertés v Chad*[25] the Commission reiterated its position that:

> The African Charter, unlike other human rights instruments does not allow for states to derogate from their treaty obligations during emergency situations. Thus, even with a civil war in Chad [derogation] cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

168. In view of the above, the African Commission finds that the Respondent State did not act diligently to protect the civilian population in Darfur against the violations perpetrated by its forces, or by third parties. It failed in its duty to provide immediate remedies

[24] See *Purohit and Another v The Gambia*, communication 241/2001 [(2003) AHRLR 96 (ACHPR 2003)].

[25] Communication 74/92 [(2000) AHRLR 66 (ACHPR 1995)] para 21.

to victims. The Commission therefore finds that the respondent state violated articles 4 and 5 of the African Charter.

Alleged violation of articles 6 and 7

169. The complainant alleges arbitrary arrests and detentions of hundreds of Darfurians. It argues that the respondent state has legal obligations pursuant to article 6 of the African Charter to respect the right to liberty as well as to protect the right to security of the person, by protecting persons within its jurisdiction from non-state actors such as the *Janjaweed* militia.

170. Article 6 of the African Charter provides that 'every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained'. Article 6 of the Charter has two arms – the right to liberty and the right to security of the person.

171. The complainant alleges that article 6 has been violated. This presupposes that the victims of the Darfur conflict, have through the actions and omissions of the respondent state, been subjected to among other violations, the loss of their right to liberty, arbitrary arrest and detention. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its deprivation is something that is likely to have a direct and adverse effect on the enjoyment of other rights, ranging from the right to family and private life, through the right to freedom of assembly, association and expression, to the right to freedom of movement.

172. A simple understanding of the right to liberty is to define it as the right to be free. Liberty thus denotes freedom from restraint – the ability to do as one pleases, provided it is done in accordance with established law. In the *Purohit and Another v The Gambia* case,[26] the Commission held that prohibition against arbitrariness requires that deprivation of liberty 'shall be under the authority and supervision of persons procedurally and substantively competent to certify it'.

173. The second arm of article 6 deals with the right to security of the person. This second arm, even though closely associated with the first arm, the right to liberty, is different from the latter.

174. Security of the person can be seen as an expansion of rights based on prohibitions of torture and cruel and unusual punishment. The right to security of person guards against less lethal conduct, and can be used in regard to prisoners' rights.[27] The right to security of the person includes, *inter alia*, national and individual security. National security examines how the state protects the physical

[26] Communication 241/01.

[27] Rhona KM Smith *Textbook on international human rights*, second edition, Oxford University Press, 2005, p 245.

integrity of its citizens from external threats, such as invasion, terrorism, and bio-security risks to human health.

175. Individual security on the other hand can be looked at in two angles — public and private security. By public security, the law examines how the state protects the physical integrity of its citizens from abuse by official authorities, and by private security, the law examines how the state protects the physical integrity of its citizens from abuse by other citizens (third parties or non-state actors).

176. The Complainant submits with respect to the present communication that the forced eviction, destruction of housing and property and accompanying human rights abuses amounted to a violation of article 6 of the African Charter. The majority of the thousands of displaced civilians who were forcibly evicted from their homes and villages have not returned, in spite of the measures taken by the Respondent State. By its own account, the respondent state admitted that only 100 000 IDPs[28] have returned to their villages. It submitted further that insecurity prevails in only 6 of the 34 Darfur localities. The numbers of needy IDPs camped in various relief centres remains high, notwithstanding the said improvements.

177. The Commission observes that IDPs and refugees can only return when security and safety is guaranteed and the Respondent State provides the protection in the areas of return. Voluntary return under situation of forced displacement must be in safety and dignity. The Commission believes that the right to liberty complements the right to freedom of movement under article 12. If the IDPs or the refugees are not able to move freely to their homes, because of insecurity, or because their homes have been destroyed, then their liberty and freedom is proscribed. Life in an IDP or refugee camp cannot be synonymous with the liberty enjoyed by a free person in normal society. The 2004 Mission of the African Commission to Darfur found that male IDPs could not venture outside the camps for fear of being killed. Women and girls who ventured outside the camps to fetch water and firewood were raped by the *Janjaweed* militia.

178. Cases of sexual and gender based violence against women and girls in and outside IDP camps have been a common feature of the Darfur conflict. The right to liberty and the security of the person, for women and girls, and other victims of the Darfur conflict has remained an illusion. The deployment of the African Union Mission in Sudan (AMIS) forces, could not guarantee the implementation of the Abuja Darfur Peace Agreement. The United Nations had to supplement the AU with the United Nations/African Union Mission to Darfur hybrid forces, (UNAMID) to provide protection to the civilian population.

[28] The figures given by UN and non-governmental humanitarian agencies operating in Darfur indicate that the number of IDPs have for the most part during the Darfur conflict ranged between 1 500 000 and 2 500 000.

179. In the present communication, the respondent state, in spite all the information regarding the physical abuse the victims were enduring, has not demonstrated that it took appropriate measures to protect the physical integrity of its citizens from abuse either by official authorities or other citizens/third parties. By failing to take steps to protect the victims, the Respondent State violated article 6 of the African Charter.

180. The complainant argues that the victims' right guaranteed under article 7(1) of the African Charter has been violated due to the failure by the respondent state to investigate and prosecute its agents and the third parties responsible for the abuses. Article 7(1) of the Charter provides that

> Every individual shall have the right to have his cause heard. This comprises (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal; (c) The right to defence, including the right to be defended by counsel of his choice; and (d) The right to be tried within a reasonable time by an impartial court or tribunal.

181. The right to be heard requires that the complainants have unfettered access to a tribunal of competent jurisdiction to hear their case. A tribunal is competent having been given that power by law, it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevent victims from accessing the competent tribunals, they would be held liable.

182. Given the generalised fear perpetrated by constant bombing, violence, burning of houses and evictions, victims were forced to leave their normal places of residence. Under these circumstances, it would be an affront to common sense and justice to expect the victims to bring their plights to the courts of the respondent state.

183. In *Rencontre africaine pour la défense des droits de l'homme v Zambia*,[29] the African Commission held that the mass expulsions, particularly following arrest and subsequent detentions, deny victims the opportunity to establish the legality of these actions in the courts. Similarly, in *Zimbabwe Human Rights NGO Forum v* Zimbabwe,[30] the African Commission noted that the protection afforded by article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the right of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief. The Commission added that 'If there appears to be any possibility of an alleged victim succeeding at a

[29] Communication 71/1992 [(2000) AHRLR 321 (ACHPR 1996)].
[30] Communication 245/2002.

hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard.'

184. To borrow from the Inter-American human rights system, the American Declaration of the Rights and Duties of Man[31] provides in article XVIII that every person has the right to 'resort to the courts to ensure respect for [their] legal rights', and to have access to a 'simple, brief procedure whereby the courts' will protect him or her 'from acts of the authority that ... violate any fundamental constitutional rights'.

185. In the present communication, the forced evictions, burning of houses, bombardments and violence perpetrated against the victims made access to competent national organs illusory and impractical. To this extent, the respondent state is found to have violated article 7 of the African Charter.

Alleged violation of article 12(1)

186. The complainant alleges that the forced evictions constitute a violation of the right to freedom of movement and residence as guaranteed in article 12(1) of the African Charter on Human and Peoples' Rights. The complainant argues that the forceful displacement of thousands upon thousands of persons from their chosen and established places of residence clearly contravenes the right to residence.

187. Freedom of movement is a fundamental human right to all individuals within states. Freedom of movement is a right which is stipulated in international human rights instruments, and the constitutions of numerous states. It asserts that a citizen of a state, generally has the right to leave that state, and return at any time. Also (of equal or greater importance in this context) to travel to, reside in, and/or work in, any part of the state the citizen wishes, without interference from the state. Free movement is crucial for the protection and promotion of human rights and fundamental freedoms.

188. Freedom of movement and residence are two sides of the same coin. States therefore have a duty to ensure that the exercise of these rights is not subjected to arbitrary restrictions. Restrictions on the enjoyment of these rights should be proportionate and necessary to respond to a specific public need or pursue a legitimate aim. Under international law, it is the duty of states to take all measures to avoid conditions which might lead to displacement and thus impact the enjoyment of freedom of movement and residence. Principle 5 of the

[31] American Declaration of the Rights and Duties of Man, OAS Res XXX, adopted by the Ninth International Conference of American States (1948), reprinted in Basic documents pertaining to human rights in the Inter-American system, OEA/Ser.L.V/ II.82 doc 6 rev 1 at 17 (1992).

Guiding Principles on Internal Displacement[32] requires states to adhere to international law so as to prevent or avoid situations that might lead to displacement.

189. The right to protection from displacement is derived from the right to freedom of movement and choice of residence contemplated in the African Charter and other international instruments. Displacement by force, and without legitimate or legal basis, as is the case in the present communication, is a denial of the right to freedom of movement and choice of residence.

190. The complainant submitted that thousands of civilian were forcibly evicted from their homes to make-shift camps for internally displaced persons or fled to neighbouring countries as refugees. People in the Darfur region cannot move freely for fear of being killed by gunmen allegedly supported by the respondent state. The respondent state failed to prevent forced evictions or to take urgent steps to ensure displaced persons return to their homes. The Commission therefore finds that the Respondent State has violated 12(1) of the African Charter.

Alleged violation of article 14

191. The complainants also alleged violation of article 14 of the Charter which provides that '[t]he right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'.

192. The right to property is a traditional fundamental right in democratic and liberal societies. It is guaranteed in international human rights instruments as well as national constitutions, and has been established by the jurisprudence of the African Commission.[33] The role of the state is to respect and protect this right against any form of encroachment, and to regulate the exercise of this right in order for it to be accessible to everyone, taking public interest into due consideration.

193. The right to property encompasses two main principles. The first one is of a general nature. It provides for the principle of ownership and peaceful enjoyment of property. The second principle provides for the possibility, and conditions of deprivation of the right to property. Article 14 of the Charter recognises that states are in certain circumstances entitled, among other things, to control the

[32] OCHA/Brookings Institution on Internal Displacement, 1999 and Implementing the collaborative response to situations of internal displacement, IASC, 2004.

[33] See communication 71/92, *Rencontre africaine pour la défense des droits de l'homme v Zambia*, communication 292/2004, *Institute for Human Rights and Development in Africa v Angola* [(2008) AHRLR 43 (ACHPR 2008)] and communication 159/1996, *Union interafricaine des droits de l'homme and Others v Angola* [(2000) AHRLR 18 (ACHPR 1997)].

use of property in accordance with the public or general interest, by enforcing such laws as they deem necessary for the purpose.

194. However, in the situation described by the present communication, the State has not taken and does not want to take possession of the victims' property. The property has been destroyed by its military forces and armed groups, acting on their own, or believed to be supported by the respondent state. Could it be said that the victims have been deprived of their right to property? The answer to this is yes, and this is supported by international jurisprudence.

195. In *Dogan and others v* Turkey,[34] the applicants allege that state security forces forcibly evicted them from their village, given the disturbances in the region at that time, and also destroyed their property.

196. The applicants complained to the European Court of Human Rights about their forced eviction from their homes and the Turkish authorities' refusal to allow them to return. They relied on among other provisions, article 1 (obligation to respect human rights), article 6 (right to a fair hearing), article 8 (right to respect for family life and home), and, article 1 of Protocol 1 (protection of property).

197. The Court also recalled that the state of emergency at the time of the events complained of was characterised by violent confrontations between the security forces and members of the PKK which forced many people to flee their homes. The Turkish authorities had also evicted the inhabitants of a number of settlements to ensure the safety of the population in the region. In numerous similar cases the Court had found that security forces had deliberately destroyed the homes and property of applicants, depriving them of their livelihoods and forcing them to leave their villages.

198. The Court recognised that armed clashes, generalised violence and human rights violations, specifically within the context of the PKK insurgency, compelled the authorities to take extraordinary measures to maintain security in the state of emergency region. Those measures involved, among others, the restriction of access to several villages, including Boydaş, as well as the evacuation of some villages.

199. The Court noted that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ancestors or lived in houses owned by their fathers and cultivated their fathers' land. They also had unchallenged rights over the common lands in the village and earned their living from breeding

[34] Applications 8803-8811/02, 8813/02 and 8815-8819/02, 29 June 2004.

livestock and tree-felling. Those economic resources and the revenue the applicants derived from them, according to the Court, qualified as 'possessions' for the purposes of article 1 of Protocol 1.

200. The Court found that the applicants had had to bear an individual and excessive burden which had upset the fair balance which should be struck between the requirements of the general interest and the protection of the right to the peaceful enjoyment of one's possessions. The Court made a finding that article 1 of Protocol 1 had been violated.[35]

201. The victims in the present communication have been forced out of their normal places of residence by government military forces and militia forces believed to be supported by the respondent state. Their homes and other possessions destroyed. The African Commission recognises that the Darfur region has been engulfed in armed conflict and there has been widespread violence resulting in serious human rights violations. It is the primary duty and responsibility of the respondent state to establish conditions, as well as provide the means, to ensure the protection of both life and property, during peace time and in times of disturbances and armed conflicts. The respondent state also has the responsibility to ensure that persons who are in harm's way, as it seems the victims were, are resettled in safety and with dignity in another part of the country.

202. In *Akdivar and Others v Turkey case*,[36] a situation similar to the one prevailing in the Darfur, involving the destruction of housing in the context of a conflict between the government and rebel forces, the European Court of Human Rights held that the state is responsible for violations perpetrated by both its own forces and the rebel forces because it has the duty to respect and protect human rights.

203. The United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005 endorsed a set of guidelines, known as the Pinheiro Principles, and recommended them to UN agencies, the international community, including states and civil society, as a guide to address the legal and technical issues concerning housing, and property restitution when the rights thereof are violated. Principle 5 addresses the right to protection from displacement. Paragraphs 5.3 and 5.4 of the Principles state the following:

> States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of lands as a punitive measure or as a means or methods of war.
>
> States shall take steps to ensure that no one is subjected to displacement by either State or non State actors. States shall also ensure that individuals, corporations, and other entities within their

35 Protocol to the Convention (European) for the Protection of Human Rights and Fundamental Freedoms, UNTS, vol 213 No I-2889.

36 No 21893/93, 1996-IV, no 15.

legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement.

204. The African Commission is aware that the Pinheiro Principles are guidelines and do not have any force of law. They however reflect the emerging principles in international human rights jurisprudence. When these principles are read together with decisions of regional bodies, such as the cited European Court decisions, the African Commission finds great persuasive value in the said principles, albeit as a guide to interpret the right to property under article 14 of the African Charter.

205. In the present communication, the respondent state has failed to show that it refrained from the eviction, or demolition of victims' houses and other property. It did not take steps to protect the victims from the constant attacks and bombings, and the rampaging attacks by the *Janjaweed* militia. It doesn't matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by article 14. The Commission therefore finds the Respondent State in violation of article 14.

Alleged violation of article 16

206. The complainant also alleges violation of article 16 of the African Charter. Article 16 provides that '[e]very individual shall have the right to enjoy the best attainable state of physical and mental health ... States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick'.

207. The complainant submits that the respondent state was complicit in looting and destroying foodstuffs, crops and livestock as well as poisoning wells and denying access to water sources in the Darfur region.

208. In recent years, there have been considerable developments in international law with respect to the normative definition of the right to health, which includes both health care and healthy conditions. The right to health has been enshrined in numerous international and regional human rights instruments, including the African Charter.

209. In its General Comment 14 on the right to health adopted in 2000, the UN Committee on Economic, Social and Cultural Rights sets out that, 'the right to health extends not only to timely and appropriate health care but also to the underlying determinants of health, such as, access to safe and portable water, an adequate supply of safe food, nutrition, and housing ...'. In terms of the General Comment, the right to health contains four elements: availability, accessibility, acceptability and quality, and impose three types of obligations on states — to respect, fulfill and protect the

right. In terms of the duty to protect, the state must ensure that third parties (non-state actors) do not infringe upon the enjoyment of the right to health.

210. Violations of the right to health can occur through the direct action of states or other entities insufficiently regulated by States. According to General Comment 14 'states should also refrain from unlawfully polluting air, water and soil ... during armed conflicts in violation of international humanitarian law ... States should also ensure that third parties do not limit people's access to health-related information and services, and the failure to enact or enforce laws to prevent the pollution of water ... [violates the right to health]'.

211. In its decision on *Free Legal Assistance Group and Others v Zaire*[37] the Commission held that the failure of the Government to provide basic services such as safe drinking water and electricity and the shortage of medicine ... constitutes a violation of article 16.

212. In the present communication, the destruction of homes, livestock and farms as well as the poisoning of water sources, such as wells exposed the victims to serious health risks and amounts to a violation of article 16 of the Charter.

Alleged violation of article 18(1)

213. With respect to the alleged violation of article 18(1), the complainants argue that the destruction of homes and evictions of the victims constituted a violation of this sub-paragraph of article 18. 18(1) recognises that '[t]he family shall be the natural unit and basis of society'. It goes further to place a positive obligation on states, stating that '[t]he family shall be protected by the state which shall take care of its physical health and moral'. This provision thus establishes a prohibition on arbitrary or unlawful interference with the family.

214. In its General Comment 19, the Human Rights Committee stated that 'ensuring the protection provided for under article 23 of the Covenant requires that states parties should adopt legislative, administrative or other measures'. Ensuring protection of the family also requires that states refrain from any action that will affect the family unit, including arbitrary separation of family members and involuntary displacement of families. In the *Dogan* case the European Court of Human Rights also held that the refusal of access to the applicants' homes and livelihood constituted a serious and unjustified interference with the right to respect for family life and home. The Court concluded that there had been a violation of article 8 of the European Convention, which protects the right to family, similar to 18(1) of the African Charter.

[37] Communications 25/89, 47/90, 56/91 and 100/93.

215. In *Union interafricaine des droits de l'homme and Others v Angola*,[38] the Commission found that massive forced expulsion, whether in peace time or war time, of population has a negative effect on the enjoyment of the right to family. In that Communication, it was alleged that between April and September 1996, the Angolan government rounded up and expelled West African nationals from its territory. These expulsions were preceded by acts of brutality committed against Senegalese, Malian, Gambian, Mauritanian and other nationals. The victims lost their belongings, and in some cases, families were separated. The African Commission held that mass expulsions of any category of persons, whether on the basis of nationality, religion, ethnic, racial or other considerations 'constitute a special violation of human rights'. The Commission added that by deporting the victims, thus separating some of them from their families, the defendant state had violated and violates article 18(1) of the Charter.

216. The respondent state and its agents, the *Janjaweed* militia forcefully evicted the victims from their homes, some family members were killed, others fled to different places, inside and outside the territory of the respondent state. This kind of scenario threatens the very foundation of the family and renders the enjoyment of the right to family life difficult. By not ensuring protection to the victims, thus allowing its forces or third parties to infringe on the rights of the victims, the respondent state is held to have violated 18(1) of the African Charter.

Alleged violation of article 22

217. The complainant alleges violation of article 22(1) of the Charter. Article 22 provides that:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

218. The right to economic, social and cultural development envisaged in article 22 is a collective right endowed on a people. To determine violation under this article, the Commission will first have to determine whether the victims constitute a 'people' within the context of the African Charter.

219. The population in the Darfur Region, alleges the complainant, is made up of three major tribes, namely the Zaghawa, the Fur, and the Marsalit. These tribes are described as being 'people of black African origin'. The respondent state is the largest state in Africa. Part of its population is of Arab stock. A common feature shared between the people of Darfur and the population of the other parts

[38] Communications 159/1996.

of the respondent state, except for Southern Sudan, is that they predominantly subscribe to the Islam religion and culture.

220. By attempting to interpret the content of a 'peoples' right', the Commission is conscious that jurisprudence in that area is still very fluid. It believes, however, that in defining the content of the peoples' right, or the definition of 'a people', it is making a contribution to Africa's acceptance of its diversity. An important aspect of this process of defining 'a people' is the characteristics, which a particular people may use to identify themselves, through the principle of self identification, or be used by other people to identify them. These characteristics, include the language, religion, culture, the territory they occupy in a state, common history, ethno-anthropological factors, to mention but a few. In states with mixed racial composition, race becomes a determinant of groups of 'peoples', just as ethnic identity can also be a factor. In some cases groups of 'a people' might be a majority or a minority in a particular state. Such criteria should only help to identify such groups or sub groups in the larger context of a state's wholesome population.

221. It is unfortunate that Africa tends to deny the existence of the concept of a 'people' because of its tragic history of racial and ethnic bigotry by the dominant racial groups during the colonial and apartheid rule. The Commission believes that racial and ethnic diversity on the continent contributes to the rich cultural diversity which is a cause for celebration. Diversity should not be seen as a source of conflict. It is in that regard that the Commission was able to articulate the rights of indigenous people and communities in Africa. Article 19 of the African Charter recognises the right of all people to equality, to enjoy same rights, and that nothing shall justify a domination of a people by another.

222. There is a school of thought, however, which believes that the 'right of a people' in Africa can be asserted only vis-à-vis external aggression, oppression or colonisation. The Commission holds a different view, that the African Charter was enacted by African states to protect human and peoples' rights of the African peoples against both external and internal abuse.

223. In this regard it protects the rights of every individual and peoples of every race, ethnicity, religion and other social origins. Articles 2 and 19 of the Charter are very explicit on that score. In addressing the violations committed against the people of Darfur, the Commission finds that the people of Darfur in their collective are 'a people', as described under article 19. They do not deserve to be dominated by a people of another race in the same state. Their claim for equal treatment arose from the alleged underdevelopment and marginalisation. The response by the Respondent State, while fighting the armed conflict, targeted the civilian population, instead of the combatants. This in a way was a form of collective punishment,

which is prohibited by international law. It is in that respect that the Commission views the alleged violation of article 22.

224. The complainant alleged that the violations were committed by government forces, and by an Arab militia, the *Janjaweed*, against victims of black African tribes. The attacks and forced displacement of Darfurian people denied them the opportunity to engage in economic, social and cultural activities. The displacement interfered with the right to education for their children and pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, which was the main cause of the conflict, the respondent state instead unleashed a punitive military campaign which constituted a massive violation of not only the economic social and cultural rights, but other individual rights of the Darfurian people. Based on the analysis hereinabove, concerning the nature and magnitude of the violations, the Commission finds that the Respondent State is in violation of 22 of the Africa Charter.

225. In conclusion, the Commission would like to address the complainant's prayer that the Commission draws the attention of the Assembly of the Africa Union to the serious and massive violations of human and peoples' rights in the Darfur, so that the Assembly may request an in-depth study of the situation. The Commission wishes to state that it undertook a fact finding mission to the Darfur *suo motu*, in July 2004. Its findings and recommendations were sent to the respondent state and the African Union. The Commission has continued to monitor the human rights situation in the Darfur through its country and thematic rapporteurs and has presented reports on the same to each ordinary session of the Commission, which are in turn presented to the Assembly of the African Union.

226. The African Union has deployed its peacekeepers together with the United Nations under the UNAMID hybrid force. In the Commission's view, these measures constitute what would most likely ensue, if an in-depth study were undertaken under article 58. The request by the complainant would have been appropriate had no action been taken by the African Commission or the organs of the African Union.

227. The African Commission concludes further that article 1 of the African Charter imposes a general obligation on all State parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights. As such any finding of violation of those rights constitutes violation of article 1.

Holding

228. Based on the above reasoning, the African Commission holds that the respondent state, the Republic of the Sudan, has violated

articles 1, 4, 5, 6, 7(1), 12(1) and (2), 14, 16, 18(1) and 22 of the African Charter.

229. The African Commission recommends that the respondent state should take all necessary and urgent measures to ensure protection of victims of human rights violations in the Darfur region, including to:

(1) Conduct effective official investigations into the abuses, committed by members of military forces, ie ground and air forces, armed groups and the *Janjaweed* militia for their role in the Darfur;

(2) Undertake major reforms of its legislative and judicial framework in order to handle cases of serious and massive human rights violations;

(3) Take steps to prosecute those responsible for the human rights violations, including murder, rape, arson and destruction of property;

(4) Take measures to ensure that the victims of human rights abuses are given effective remedies, including restitution and compensation;

(5) Rehabilitate economic and social infrastructure, such as education, health, water, and agricultural services, in the Darfur provinces in order to provide conditions for return in safety and dignity for the IDPs and Refugees;

(6) Establish a National Reconciliation Forum to address the long-term sources of conflict, equitable allocation of national resources to the various provinces, including affirmative action for Darfur, resolve issues of land, grazing and water rights, including destocking of livestock;

(7) Desist from adopting amnesty laws for perpetrators of human rights abuses; and

(8) Consolidate and finalise pending peace agreements.

Darfur Relief and Documentation Centre v Sudan

(2009) AHRLR 193 (ACHPR 2009)

Communication 310/2005, *Darfur Relief and Documentation Centre v Republic of Sudan*

Decided at the 46th ordinary session, November 2009, 27th Activity Report

Local remedies not exhausted since complainant had not taken case to the Constitutional Court

Admissibility (compatibility with the Charter, 63, complainant not properly identified 62, insulting language 64-68, local remedies, exhaustion of 70-73, submission of communication within reasonable time 74-79)

Summary of facts

1. This communication is submitted by the Darfur Relief and Documentation Centre (DRDC) (the complainant), on behalf of 33 Sudanese citizens (the victims) against the Republic of Sudan (the respondent state).

2. The complainant states that the victims were hired by the Iraqi — owned Southern Oil Company in the early 1980s as drivers, mechanics, electricians, cooks, servants and manual workers in the oil fields of the said company in Basra City (Southern Iraq).

3. On 22 and 23 February 1983 the said victims were arrested during the first Gulf War between Iran and Iraq and taken to Iranian territory on 24 February 1983 as civilian war detainees where they were detained in special military prisons, until 5 October 1990 (seven years), when they were released and repatriated to Sudan.

4. The complainant submits that while in detention, the victims lost their sources of income and were unable to communicate with their families and lawyers; they were psychologically and physically tortured, had no access to medical treatment and could not carry out their religious rituals.

5. Following the victims' release from prison, the Iraqi government agreed to meet part of the unpaid salaries for the years that they had spent in Iranian custody. No arrangements were made

to pay compensation, damages or reparations for the suffering caused to the victims during their detention.

6. A total of US$ 500 000, paid in Sudanese currency at the exchange rate of the day of payment, was to be given to the detainees and divided evenly among all of them. It was agreed by the governments of Sudan and Iraq that the said amounts would be paid to the victims through the Ministry of Finance and Economic Planning in Khartoum. The two governments further agreed that the full amount would be deducted from the debt that Sudan owed Iraq.

7. The complainant submits further that the Ministry of Finance and Economic Planning in Khartoum informed the victims about the payment arrangements reached between Sudan and Iraq .The victims accepted the payment terms despite the fact that they were not part of the negotiations that led to the payment agreement reached between Sudan and Iraq. This included payment in Sudanese currency and yet their salaries had been earmarked in US dollars.

8. The complainant alleges that on 20 March 1992, the Sudanese Ministry of Finance and Economic Planning approved the payments to the victims and instructed the bank of Sudan to effect the said payments. Subsequently, on 15 April 1993 and 10 May 1993, a total of US$ 167 367 (SP 22 700 000) was paid to the victims as the first instalment. Each victim received the equivalent of US$ 5 230. The Ministry of Finance and Economic Planning promised to pay the remaining balance amounting to US$ 332 633 at a later date.

9. Payment of the remaining balance due to the victim was delayed and the complainant states that the Ministry of Finance and Economic Planning eventually refused to pay the said amount altogether. The complainant alleges that the then First Under-Secretary at the Ministry of Finance and Economic Planning, Mr Hassan Mohamed Taha was responsible for ensuring that the said amounts were not paid to the victims.

10. The complainant submits that the victims have attempted to use all the legal and political avenues available in order to have their rights recognised and recover the monies owed them but to no avail.

Articles alleged to have been violated

11. The complainant alleges that articles 1, 2, 5, 7(1)(a), 14 and 16(1) of the African Charter on Human and Peoples' Rights have been violated.

Prayers

12. The complainant requests the African Commission to urge the government of Sudan to:

- Pay the outstanding balance due to the victims which currently amounts to US$ 2 965 789, taking into account the accumulated benefit over the years or *rebeeh*[1] specified under the Islamic banking system applied in Sudan;
- Pay an additional US$3 million in compensation for the material, social and psychological damage and disruption of life that the victims have endured during the last 13 years. This brings the total amount being requested to US$5 965 789.

13. The complainant further requests that in case of delay in satisfactorily settling the communication and effecting payment, similar benefits should be paid during 2006 and the subsequent years, as well as, US$ 1 000 000 compensation for each additional year from 1 January 2006. The complainant seeks payment of the above balance, benefits and compensation in US currency to be divided equally between the victims.

Procedure

14. The communication is dated 22 November 2005 and was received by the Secretariat of the African Commission on 24 November 2005.

15. At its 38th ordinary session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the communication and decided to be seized of it.

16. By *note verbale* dated 8 December 2005, the Secretariat transmitted a copy of the communication to the respondent state by DHL and requested it to forward its submissions on admissibility within three months. The complainant was also requested to send its submissions on admissibility within three months.

17. On 13 February 2006, the Secretariat of the African Commission received the complainants' submissions on admissibility and acknowledged receipt of the same in a letter dated 14 February 2006. A copy of the complainants' submissions on admissibility was forwarded to the respondent state by fax and email.

18. By *note verbale* dated 20 March 2006, the respondent state was reminded to forward its written submission on admissibility of the communication.

19. On 20 May 2006, the Secretariat of the African Commission received a *note verbale* dated 20 May 2006 and attached to it was the state's submission on admissibility.

[1] According to the Islamic banking system the '*rebeeh*' is an annual benefit on the principal fund. This amount is multiplied by 120%.

20. During the 39th ordinary session of the African Commission, the Commission decided to defer its decision on admissibility of the communication to its 40th ordinary session. By letter and *note verbale* dated 31 May 2006, the Secretariat informed the complainant and the state respectively, of the Commission's decision to defer the communication to its 40th session.

21. By email dated 16 April 2007, the Secretariat received a letter dated 10 April 2007, from the complainant, which had attached to it, additional submissions and documents in reply to the submissions of the respondent state.

22. At its 40th ordinary session, the African Commission decided to defer the communication for further consideration on admissibility, to its 41st ordinary session.

23. During its 41st ordinary session which was held in Accra, Ghana, the Secretariat of the African Commission received, on the 22 of May 2007, a letter to the African Commission to which was attached further submissions by the complainant in reply to the respondent state's submission on admissibility.

24. At the 41st ordinary session of the African Commission, the decision on admissibility of the communication was further deferred to the 42nd ordinary session.

25. At the 42nd session of the African Commission the decision on admissibility of this communication was deferred, to get clarification on some issues from the complainants.

26. At the 43rd session the Secretariat was yet to receive the complainant's response and as a result deferred the communication to the 44th ordinary session.

27. The communication was further deferred during the 44th session to give time to the Secretariat to draft its decision on admissibility.

Law

Admissibility

Summary of the complainant's arguments on admissibility of the communication

28. The complainant states that a letter was addressed to the president of Sudan HE Omar El Bashir requesting him to intervene in the matter and resolve the case.

29. After studying the relevant documents relating to this matter, the Solicitor-General, on 5 September 2000 forwarded a legal opinion to the Ministry of Finance and Economic Planning confirming that the

victims were entitled to the payment of the outstanding balance held by the said Ministry.

30. On 28 August 2001, Dr Maghzoub Al Khalifa, the then chairperson of the Joint Iraqi-Sudanese Ministerial Committee and a former Minister of Agriculture and Forestry of Sudan, sent a letter to the Ministry of Finance and Economic Planning reminding them of the agreement between the Sudanese and Iraqi governments and requesting them to pay the victims the outstanding amounts without delay.

31. The complainant states that since attempts at solving the matter amicably had failed, the victims decided to pursue the matter in the courts of law.

32. The complainant states that on 18 June 2000, the victims in this matter filed a complaint against the Ministry of Finance and Economic Planning before the court of first instance in Khartoum. The case AM/ 1724/2000 was dismissed by the court on 21 March 2000. The victims appealed against the judgment of the court of first instance before the Court of Appeal in case ASM/475/2001. On 7 July 2001, the Court of Appeal issued an order to the Court of First Instance to reconsider its judgement and on 19 February 2002 the Court of First Instance dismissed the case once again.

33. The victims appealed against the second judgment of the Court of First Instance to the Court of Appeal in Khartoum in case ASM/250/ 2002 and on 26 December 2002, the Court of Appeal upheld the judgment of the Court of First Instance and dismissed the case.

34. The victims approached the High Court in Khartoum, civil circuit in case MA/TM/165/2003 for an injunction against the ruling of the Court of Appeal. However, on 18 June 2003, the High Court decided to uphold the ruling of the Court of Appeal and dismissed the matter. The complainants allege that the decisions of the Court of First Instance, Court of Appeal and the High Court, to dismiss the case, were based on technicalities and not on the spirit of justice, law and good conscience.

35. Consequently, the complainant submits that the victims have exhausted all domestic remedies by virtue of the ruling of the High Court on 18 June 2003, which dismissed the case.

36. The complainant submits that when reaching their judgments, the courts neglected to take into account elementary facts that would have favoured the victims' case. For instance, the fact that the victims received a part payment in respect of the agreement reached between Sudan and Iraq and that the Ministry of Finance and Economic Planning made an undertaking to pay the victims the outstanding balance; failure to take into account the legal opinion of the Solicitor-General stating that he was not a witness to specific incidents. They also claim that the decisions of these courts to dismiss

the matter were based on technicalities and not on the spirit of fairness, law and justice.

37. The complainant submits further that the Sudanese domestic courts are not competent to deal with a case of such magnitude and notes that the High Court when delivering its judgement in respect of the application for an injunction stated that the amount of financial indemnification claimed in this case supersedes the amount fixed by the judicial circular 44/99 which is a necessary condition for acceptance of an injunction before the High Court.

38. Additionally, the complainant avers that the courts in Sudan failed to take into consideration the fact that the then ruling regime in Iraq was totalitarian and that the one in Sudan is military and as such citizens are unable to interfere with government decisions or procure the necessary documents that could prove their cases in a court of law.

39. For these reasons, the complainant submits that the domestic judicial process was flawed and could not render justice to the victims.

40. The complainant states that Sudan has been under totalitarian military government headed by a president who is still an active army officer since 30 June 1989. Consequently, the regime pursues a systematic policy of control and domination at all levels of the state apparatus including the judiciary whose procedure and decisions are not respected. As a result, Sudanese citizens, groups and organisations are unable to submit cases relating to human rights before the courts of law for fear of harassment, threats and intimidation by the government security agents.

41. To illustrate that the judiciary is not independent, the complainant refers the African Commission to the annual reports the then UN Special Rapporteur on the Situation of Human Rights in Sudan in the fifty-eighth[2] and the fifty-ninth[3] sessions of the UN Commission on Human Rights which make reference to the lack of independence of the judiciary in Sudan. Furthermore, the complainant states that the International Commission of Inquiry on Darfur (ICID), established by the UN Security Council in October 2004 to investigate crimes committed within the context of the armed conflict in Darfur also examined the judicial system in Sudan as part of its mandate. In its report of 25 January 2005, the ICID gives a comprehensive overview of the Sudanese judicial system.[4] The complainant submits that the report acknowledges that during the last decade the judiciary appeared to have been manipulated and politicised and as such

2 E/CN.4/2002/46 dated 23 January 2002, para 19, 20 and 21 pp 6 and 7.
3 E/CN.4/2003/42 dated 6 January 2003, para 28 p 8.
4 See paras 432-455, pp 111-115.

judges who disagreed with the government often suffered harassment, including dismissals.[5]

42. The complainant notes that, the commission of inquiry stated that it 'considers that in view of the impunity which reigns in Darfur today, the judicial system has demonstrated that it lacks adequate structures, authority, credibility ...'.[6]

43. The complainant also draws the attention of the African Commission to its decision in *Amnesty International, Comité Loosli Bachelard, Lawyers Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v Sudan*[7] in which the Commission found that the judiciary in Sudan was not independent. The complainant state that even after this pronouncement by the Commission, the situation in Sudan has not improved but has in fact deteriorated in manifolds, as more judges are purged from the judiciary and supporters of the government were appointed in their place.

Summary of the respondent state's submission on admissibility

44. The respondent state starts by stating that the judicial system of the Sudan is one of the most competent and efficient organs of the state based on the principle of its total independence and the principle of separation of powers. It goes further to state that the judicial system is efficient, honest and characterised with competence. The state submits that the Sudan is one of the few African states which has a Supreme Court in every province and a judicial system which is available to all.

45. The state contends that the complainants have not fulfilled the conditions stated in article 56 of the African Charter. The respondent state submits that the complaint has not complied with the condition in article 56(5) of the African Charter which provides for the exhaustion of local remedies before a communication is brought before the African Commission.

46. The state submits in this regard, that the complainants are afforded the opportunity to have their cases heard by the Constitutional Court and Department of Grievances these are the two mechanisms put in place by the Constitution of Sudan, for the protection of human rights. The state substantiates this claim with documents on statistics illustrating the judicial performance in the

5 See Report of the International Commission of Inquiry on Darfur, at p 111 at para 432.

6 See Report of the International Commission of Inquiry on Darfur, at p 115 at para 455.

7 Communications No 48/90, 50/91, 52/91 and 89/93 [(2000) AHRLR 297 (ACHPR 1999)].

Sudan and states that the complainants are yet to exhaust all these avenues which are available to them.

47. The respondent state claims that the provision of article 56(1) was not fulfilled because the complaint 'was submitted by a so-called Abdul-Baqui Jubril on behalf of Dafur Centre for Relief and Documentation Centre'. The state further states that this person continues to lodge complaints which are not backed by any evidence or legal basis, sometimes to the Commission, presenting complaints under the umbrella of a number of civil society organisations.

48. The state further states that the complainant has failed to comply with the provisions of article 56(2) of the African Charter and that the complainant's resort to article 1 of the Charter is not applicable in the present case. The state submits that the ultimate nature of any case is that there is a winner and a loser and states further that the Charter requires that there is compliance with the law when rights of individuals and groups are discussed. It goes further to state that it is unacceptable to say that the judgments passed by the courts are in violation of human rights, that these judgments testify to the reality and are in keeping with the letter and spirit of the African Charter and the AU Charter and that any assumption contrary to that shall be tantamount to denying the courts of the member states of their functions.

49. The state goes further to state that the international human rights instruments recognise the sovereignty of states and the rule of the natural law existing in these states and that any assumption to the contrary is itself a blatant violation of the law.

50. The respondent state further submits that the complaint is not in compliance with article 56(3) of the African Charter, which provides that a communication brought before the Commission should not be written in insulting or disparaging language. The state contends that the complainants' submissions, especially in paragraph 40 of the communication contained statements which had improper utterances against officials as well as the methods of the application of justice and the rule of law in the Sudan.

51. The respondent state also submits that the complaint is not in conformity with article 56(6) of the African Charter, which provides that a communication should be brought within a reasonable time after the exhaustion of local remedies. The state contends that the present communication was brought before the Commission after the expiration of 31 months of the court's judgement.

52. That for these reasons the communication should be declared inadmissible by the African Commission.

Summary of the complainants' reply to the respondent state's submission on admissibility

53. The complainant alleges that though the Supreme Court is the highest court in the Sudan, the Civil Procedures Act of Sudan provides that the 'Supreme Court shall have jurisdiction to determine: Objection by way of cassation against the decisions and orders of the Courts of Appeal concerning objections against administrative decisions'.

54. The complainant also argues that the communication does not have to do with, nor were it brought before the Shar'ia courts; it is a civil suit which was properly brought before the civil law circuit.

55. Also the complainant submits that the final decision of the High Court which dismissed their case was handed to them by the registrar, more than three months after its pronouncement by the court. This delay prevented the petitioners from bringing an application for review of the Supreme Court's judgment within the prescribed period of 15 (fifteen days).

56. On the contention of the respondent state that they could bring their matter before the Constitutional Court, the complainants state that the Sudan's Constitutional Bill of 2005, outlines the jurisdiction, functions and powers of the Constitutional Court. This Bill provides that the Constitutional Court has no jurisdiction to review judgements, decisions, proceedings, and orders passed by the judiciary. This means that the Constitutional Court lacks the competence to entertain matters that were already dealt with by other courts.

57. The complainant also alleges that the victims' ordeal with the Sudanese authorities has been going on since 1993, when the Ministry of Finance and Economic Planning failed to pay the remaining balance of the funds. The victims then started proceedings in the courts in 2000, which was finally dismissed by the High Court in June 2003, and according to the complainants, the victims have exhausted all means possible at their disposal to recover their outstanding funds to no avail.

58. The complainant also allege that the judiciary of the Sudan is not independent of the government in the discharge of its duties. This it alleges is due to the fact that the country is ruled by a totalitarian military regime. That the government pursues a systematic policy of tight control and domination at all levels of the state apparatus including the judiciary.

59. The complainant alleges that in view of the above facts, it has exhausted all possibilities for local remedy in the Sudanese courts and seek that the African Commission finds this communication admissible.

Analysis on admissibility

60. The admissibility of communications within the African Commission is governed by the requirements of article 56 of the African Charter. This article provides seven requirements which must all be met before the Commission can declare a communication admissible. If one of the conditions/requirements is not met, the Commission will declare the communication inadmissible, unless the complainant provides sufficient justifications why any of the requirements could not be met.

61. In the present communication, the complainant claims that it has fulfilled all the requirements of article 56 of the African Charter. The respondent state on the other hand submits that five requirements of admissibility, that is, article 56(1), (2), (3), (5) and (6), have not been met.

62. Article 56(1) of the African Charter states that 'communication relating to Human and Peoples' Rights ... received by the Commission shall be considered if they indicate their authors even if the latter request anonymity ...'. According to the respondent state, the communication does not indicate the authors. The communication received by the African Commission indicates that the author of the communication is the Darfur Relief and Documentation Centre which brought the communication on behalf of 33 Sudanese nationals whose names are stated in the communication. This means that the author of the communication and the victims are clearly identified. The Commission therefore holds that the requirement under article 56(1) of the African Charter has been met.

63. The state also submits that the communication is incompatible with the Charter of the Organisation for African Unity (OAU) and as such does not comply with article 56(2), of the African Charter. This sub-article provides that 'communications ... received by the Commission shall be considered if they are compatible with the Charter of the Organisation of African Unity or with the present Charter.' In the present case, there is evidence of *prima facie* violation of the African Charter in the refusal of the Ministry of Finance and Economic Planning (an institution of the Sudanese government), to pay the outstanding balance of the money due to the 33 Sudanese nationals in breach of the agreement between the Sudanese and Iraqi governments to pay them this money as compensation for their time in Iranian prisons. Secondly, in view of the compatibility requirements, Sudan is a state party to the African Charter. Thirdly, the Republic of Sudan became party to the Charter on 18 February, 1986, the alleged violations in this communication falls within the period of the Charter's application to Sudan. Lastly, the alleged violation took place within the territorial sphere which the Charter applies. For these reasons, the Commission holds that the

communication has sufficiently fulfilled the requirement of article 56(2) of the African Charter.

64. In its submission, the state calls on the African Commission to declare the communication inadmissible on the ground that it does not comply with article 56(3) of the African Charter which states that 'communications ... received by the Commission shall be considered if they are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organisation of African Unity (AU)'.

65. The respondent state objects to the statements made by the complainant in paragraph 40 of the complaint arguing that it is improper to describe any sovereign state as such. Paragraph 40 of the complaint states that '[t]his communication documents a situation of absolute misuse of government authority and executive powers to inflict gross injustice and suffering among a vulnerable segment of the Sudanese citizens. This situation is a classical example of the absence of accountability of public officials and for the lack of proper administration of justice and the rule of law in Sudan'.

66. In its decision on admissibility in *Zimbabwe Lawyers for Human Rights and Associate Newspapers of Zimbabwe v Zimbabwe*,[8] the African Commission stated *inter alia* that 'in determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, article 56(3) must be interpreted bearing in mind article 9(2) of the African Charter which provides that 'every individual shall have the right to express and disseminate his opinions within the law'. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression'.

67. The decision taken in *ZLHR* case should be distinguished from another decision of the African Commission in *Ligue Camerounaise des Droits de l'Homme v Cameroon*,[9] where the African Commission held that the communication was inadmissible because of the

8 Communication 284/2003.
9 Communication 65/92 [(2000) AHRLR 61 (ACHPR 1997)].

complainant's use of language like '[President] Paul Biya must respond to crimes against humanity', '30 years of the criminal neo-colonial/ regime', 'regime of torturers', 'government barbarisms' etc., as this was considered as insulting language.

68. The respondent state in this communication does not expressly state that the communication was insulting or disparaging but however noted that the language used is 'improper'. In the opinion of the African Commission, the language used in the communication, and especially in paragraph 40, is not insulting or disparaging to the government of Sudan and as such, is not contrary to article 56(3). For this reason, the Commission holds that the proviso under article 56(3) has been complied with.

69. Article 56(4) of the Charter provides that a communication would be admissible if it is '... not based exclusively on news disseminated by the mass media'. There is nothing in this communication which has shown that it was based on news by the mass media and none of the parties have contested that point. To this end the African commission holds that this proviso has been fulfilled.

70. The respondent state further submits that the communication does not comply with article 56(5) of the African Charter which requires that 'communications ... received by the Commission shall be considered: if they are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged'. The Commission has stated that the justification for this requirement is that a government should be aware of a human rights violation in order to have a chance to remedy such violation, thus protecting its reputation which may be tarnished by being called to plead its case before an international body. This requirement also precludes the African Commission from becoming a tribunal of first instance, a function which it cannot fulfil practically or legally.

71. In the present case, the respondent state contends that the complainant has not exhausted local remedies available to it in the Sudan. The state submits that the complainant has not brought its case before the Supreme Court for review and have also not taken the matter to the Constitutional Courts on appeal. Article 15(2) of the Constitutional Court Act of Sudan (as amended in 2005), stipulates that '... there shall not be subject, to review of the Constitutional Court, the business of the Judiciary, the judgements, decisions, proceedings and orders passed by the Courts thereof'. This means that the Constitutional Court has no jurisdiction to entertain appeals arising from judgements, decisions, proceedings, and orders passed by the judiciary.

72. The author alleges that the matter was first brought before the Court of First Instance, but the case was dismissed, an appeal of this ruling was made to the Court of Appeal which ordered

reconsideration of the matter in the court of first instance. The case was dismissed a second time by the Court of First Instance and this time the judgement was upheld by the Court of Appeal. The victims then brought the case before the High Court which approved the judgement of the Court of First Instance and dismissed the case. The complainant claims that there is no other court where they could take the case.

73. The respondent state has however pointed out that there is still an option of taking the case before the Constitutional Court of the Sudan, available to the complainants. The Constitutional Court Act of Sudan provides that '[t]he Court ... shall assume protection of the rights of a human being and the fundamental freedoms thereof'[10] This, according to the state, means that the complainant can still take its case on the alleged violation of the rights of the 33 Sudanese, to the Constitutional Court of Sudan for a remedy of the complaint. The African Commission therefore holds that not all the local remedies which are available to the complainants have been exhausted in accordance with article 56(5) of the Charter, and as such the communication has not fulfilled this proviso.

74. Regarding the requirement under article 56(6) of the African Charter which provides that 'communications ... received by the Commission shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter'. The African Commission notes that the Charter does not provide for what constitutes 'a reasonable period of time', and neither has it defined reasonable time. For this reason, the African Commission would therefore treat each case on its own merits.[11]

75. Articles 60 and 61 of the African Charter provides that the African Commission, in deciding matters brought before it, should draw inspiration from international law on human and peoples' rights. The African Commission in this communication would look at the jurisprudence of the European Court on Human Rights and the Inter-American Commission on Human Rights. The European Convention on Human Rights and Fundamental Freedoms provides that the (European) 'Court on Human Rights ... may only deal with the matter ... within a period of six months from the date on which the final decision was taken',[12] after this period has elapsed, the European Court on Human Rights will declare such application inadmissible.

10 Constitutional Court Act art 15(1)(d)

11 Communication 308/05- *Michael Majuru v Zimbabwe* [(2008) AHRLR (ACHPR)2008] and Communication 43/90 *Union des Scolaires Nigeriens- Union Generale des Etudiants Nigeriens au Benin v Niger* [(2000) AHRLR 176 (ACHPR 1994)], where the Communication was declared inadmissible on the ground that none of the conditions relating to form, time limit or procedure laid down under art 56 and Rule 114 of the (previous version of the rules of procedure) were complied with.

12 European Convention on Human rights art 26.

The American Convention on Human Rights also provides that to be declared admissible, 'the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment'.[13] The Convention went further to provide circumstances where this provision will not be applicable to include when 'there has been unwarranted delay in rendering a final judgment under the aforementioned remedies'.

76. The Inter American Commission on Human Rights has indicated that the six month period provided for in article 46(1)(b) of the American Convention 'has a twofold purpose: to ensure legal certainty and to provide the person concerned with sufficient time to consider his position'.[14]

77. In the present communication, a period of twenty nine (29) months (2 years and 5 months) has elapsed between the time when the High Court dismissed the matter (18 June 2003), and when the communication was submitted to the African Commission (24 November 2005). The complainant submitted this communication way beyond a time which could be considered reasonable, looking at the European Court and the Inter- American Court jurisprudence. The complainants have also not given any compelling reason why there was such a long wait before bringing the matter before the African Commission.

78. The provision of the Charter regarding time limit in article 56(6) is to make a party complaining of a wrong done by a state, to be vigilant and to discourage tardiness from prospective complainants. However, where there is a good and compelling reason why a complainant does not submit his complaint to the Commission for consideration, the Commission has a responsibility, for the sake of fairness and justice, to give such a complainant an opportunity to be heard.

79. In the present case, there is no sufficient reason given as to why the communication could not be submitted within a reasonable period. For this reason, the African Commission holds that the communication does not fulfil the proviso of article 56(6) of the African Charter.

Decision of the Commission

80. It must be reiterated that the African Charter provides that all the requirements in article 56 must be fulfilled before a communication will be declared admissible by the African

13 American Convention on Human Rights art 46(1).

14 IACHR, Case 11.230, Francisco Martorell, Chile, Annual Report 1996, Report no 11/96, para 33.

Commission. The Commission holds that the provisions of sub-articles 5 and 6 of article 56 have not been fulfilled by the complainant.

81. In view of the above, the African Commission decides:

(1) to declare the communication inadmissible;

(2) to transmit its decision to the parties;

(3) to publish this decision in its 27th Activity Report.

Doebbler v Sudan

(2009) AHRLR 208 (ACHPR 2009)

Communication 235/2000, *Dr Curtis Francis Doebbler v Sudan*

Decided at the 46th ordinary session, November 2009, 27th Activity Report

Forced repatriation of refugees not proved

Admissibility (local remedies, exhaustion of, 86, 116-117; failure to exhaust local remedies, 77-78)
Cruel, inhuman or degrading treatment (non-refoulement, 146, 150-156, 163)
Evidence (author's claims not corroborated, 163)
Refugees (non-refoulement, 146, 150-156, 163; cessation of status, 148-149)

Summary of alleged facts

1. The complainant represents 14 000 Ethiopian refugees who fled Ethiopia prior to 1991 during the Mengistu regime and lived in Sudan and were a subject of forced repatriation pursuant to a decision adopted by the respondent state and the United Nations High Commission for Refugees (UNHCR) in September 1999. The complainant states that during the 1980s and early 1990s an estimated 80 000 Ethiopians entered Sudan fleeing from persecution and from events disturbing public order in Ethiopia.

2. The complainant alleges that the current government in Ethiopia was formed by officials of the Tigrayan People's Liberation Front (TPLF) party, who were allies with the Ethiopian People's Revolutionary Party (EPRF) during the struggle against the Mengistu regime. The supporters of the EPRP are allegedly the main target of repression by the Ethiopian government throughout the country.

3. The complainant alleges that all Ethiopian refugees in Sudan were previously granted asylum by the government of Sudan in accordance with its international obligations. The United Nations High Commission for Refugees, the agency responsible for the protection of refugees worldwide, also honoured this recognition until September 1999.

4. The complainant alleges that in September 1999, the government of Sudan signed an agreement with the UNHCR to invoke

the cessation clauses (article 1(c)(5) of the 1951 UN Convention Relating to the status of Refugees) with effect from 1 March 2000.

5. The complainant alleges that by this agreement, Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation back to Ethiopia.

6. The complainant states that in February 2000, a notice was posted on the door of the UNHCR compound in Khartoum, Sudan, entitled 'Information Announcement to the Ethiopian Refugees in Sudan' and stated in part:

> The government of Sudan represented by the Commission for Refugees (COR) and the United Nations High Commissioner for Refugees (UNHCR) would like to inform all Ethiopian Refugees in Sudan of the following:
>
> All Ethiopian refugees outside Ethiopia after 1 March 2000 will lose their legal refugee status. This means all the legal rights granted by international, regional and local regulations which guarantee refugees status or condition as stipulated in the 1951 Geneva convention generally governing that status and treatment of refugees etc ..., the legal status in respect of resolving individual cases and the right to appear before the courts etc ..., the right to acquire employment and the guarantees, the issue of comprehensive guidance and supply of shelter, health and treatment, education, food, social security, etc ... and in conclusion, the various administrative assistance, and permits like travel permits, employment permits, driving licences, identity cards, residence and travel documents for travelling abroad and commercial licences etc ... ; all will cease to exist forthwith ...
>
> In light of this new situation, any Ethiopian refugee who decides to remain in the Sudan after 1 March 2000 will bear full responsibility of the consequences which may follow as the result of the forfeiture of his entitlements which he used to enjoy as a refugee before 1 March 2000. ...
>
> To avoid unnecessary problems, which will occur as a result of your illegal stay in the Sudan after 1 March 2000, we request you to seriously consider the circumstances which will assist you in taking a reasonable decision to guarantee your safety and that of the future of your family.

7. The complainant states that although the government had only agreed to withdraw refugee status, dozens of refugees reported that the UNHCR informed them that they would be deported after 1 March 2000 and that any benefits that they were receiving would cease. Furthermore, some of the refugees were arrested, beaten, and further mistreated as a consequence of their protests against their involuntary repatriation.

8. The complainant states that the respondent state, the UNHCR and the government of Ethiopia entered into an agreement to forcibly repatriate them. This action consisted of several steps, including all of the following: the withholding of social welfare benefits such a medical attention, food, clothing, and housing entitlements; and the implementation of an unfair screening procedure.

9. The complainant states that some of the refugees who protested the removal of their refugee status were sometimes

arrested and deported or threatened with arrest and deportation, forcing many of them to flee to neighbouring countries.

10. The complainant further alleges that at the time, Ethiopia was involved in a full-scale international armed conflict with its neighbour Eritrea.

11. The complainant states that the UNHCR and the respondent state agreed bi-laterally to establish a screening procedure. The complainant alleges that this procedure did not provide the basic minimum standards of due process. For example, the refugees were not allowed to be legally represented; the government of Sudan and/or the UNHCR recruited unqualified persons to do the screening. The screening did not take into account the 1969 African Refugee Convention or the African Charter in their evaluation of individual cases; the screenings did not start until months after the threat of forcible *refoulement* had been made, and implemented in large parts. Interpreters were recruited from the Ethiopian embassy in Khartoum — the embassy of the state from which they harboured or had a recognised, well-founded fear of persecution.

12. The complainant states that some of the refugees had lived and settled in Sudan for up to 30 years; that many of them are opponents of the Ethiopian People's Revolutionary Democratic Front (EPRDF) and the Tigrayan People's Liberation Front (TPLF), ruling the country since 1991. The complainant states that many refugees feared that they would be sent to the Ethiopia/Eritrea warfront, due to the war which was ongoing during the whole of 2000 or that they would be mistreated or even killed by the Ethiopian government.

13. The complainant states that some of the refugees, such as Mr Luel Kassa, who was forced to return in early 2001, were arrested upon return; and others fled Ethiopia again to Sudan or a third country as soon as they were able to.

14. The complainant states further that many of the estimated 14 000 Ethiopian refugees who are still living in Sudan do not wish to return to Ethiopia because they have a well-founded fear of persecution or because they are fleeing the war and famine in Ethiopia.

15. The complainant states that in March 2001, more than 1 700 Ethiopian refugees in Port Sudan and Khartoum staged a hunger strike to protest their return. Their main complaint: the unfair process for determining their status.

16. Since March 2001, the complainant has contacted the government of Sudan and the UNHCR in an effort to resolve this matter, but without success.

17. The complainant states that although some refugees were allowed to stay in Sudan, others remained without the consent of the

government of Sudan and feared the prospect of immediate deportation without due process of law. The complainant further alleges that many of these refugees live in inhuman conditions after being denied the basic necessities of life.

Complaint

18. The complainant alleges violations of articles 4, 5, 6, 12(3), (4) and (5) of the African Charter on Human and Peoples' Rights (African Charter).

Procedure

19. The complaint was received at the Secretariat of the African Commission on 22 February 2000.

20. At the 27th ordinary session held from 27 April to 11 May 2000 in Algiers, Algeria, the African Commission decided to be seized of the communication and requested the parties to address it on the exhaustion of domestic remedies.

21. The above decision was communicated to the parties on 30 June 2000.

22. At its 28th ordinary session held from 23 October to 6 November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th ordinary session.

23. On 13 March 2001, the Secretariat received the complainant's submissions on admissibility.

24. At the 29th ordinary session held from 23 April to 7 May 2001 in Tripoli, Libya, the respondent state informed the African Commission that they were not aware of communications 235/00 and 236/00 — submitted by Dr Curtis Doebbler against Sudan. During the session, the Secretariat provided the respondent state with copies of the said communications. The African Commission decided to defer consideration of these communications to the next session.

25. On 19 June 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the respondent state to forward its written submissions within two months from the date of notification of this decision.

26. On 14 August 2001, a reminder was sent to the respondent state to forward its submissions within the prescribed time to enable the Secretariat to process the communication.

27. During the 30th ordinary session held from 13 to 27 October 2001 in Banjul, The Gambia, the Secretariat of the African Commission received the respondent state's written submissions in Arabic on all pending communications against it on admissibility.

28. During the same session, the African Commission heard the oral submissions of the parties with respect to the communication. The African Commission noted that the respondent state had not responded to the issues raised by the complainant. The African Commission therefore decided to defer the communication to the 31st session, pending receipt of detailed written submissions from the respondent state.

29. On 15 November 2001, the Secretariat informed the parties of the decision and requested the respondent state to forward its written submissions on the issues raised by the complainant within two months from the date of notification of this decision.

30. On 7 March 2002, a reminder was sent to the respondent state to forward its submissions within the prescribed time.

31. At its 31st ordinary session held from 2 to 16 May 2002, in Pretoria, South Africa, upon the request of the complainant, the African Commission decided to suspend consideration of this communication in order to allow the parties to pursue an amicable settlement.

32. On 29 May 2002, the parties were informed of the decision of the African Commission.

33. On 17 August 2002, the complainant informed the Secretariat that he had written to the respondent state with a view to negotiating an amicable settlement. However, he had not received any response from the government of Sudan.

34. On 16 January 2003, the Secretariat received a request from the complainant for a hearing on admissibility. The Secretariat acknowledged receipt of this correspondence on 27 January 2003.

35. The Secretariat informed both parties that the admissibility of the communication would be considered at the 33rd ordinary session.

36. At its 33rd ordinary session held from 15 to 29 May 2003 in Niamey, Niger, the African Commission deferred its decision on admissibility to allow the parties more time to send their written submissions on admissibility.

37. On 18 June 2003, the Secretariat of the African Commission informed both parties of the above-mentioned decision and requested them to forward their written submissions on admissibility within three months from the date of notification of this decision.

38. On 18 September 2003, the Secretariat reminded the parties to provide the African Commission with their submissions on admissibility.

39. By letter dated 19 September 2003, the complainant forwarded a brief on admissibility concerning the exhaustion of domestic remedies.

40. By a *note verbale* dated 30 September 2003, the respondent state was informed that the communication would be considered at the 34th ordinary session. The arguments of the complainant were attached to the *note verbale*.

41. During it 34th ordinary session held in Banjul from 6 to 20 November 2003, the African Commission considered the respondent state's arguments on admissibility and declared the communication inadmissible for non-exhaustion of domestic remedies.

42. On 4 December 2003, the Secretariat of the African Commission transmitted the decision to the parties.

43. On 10 February 2004, the complainant requested the African Commission to reconsider its decision on admissibility and requested an oral hearing at the next ordinary session.

44. During the 35th ordinary session, the Commission considered the request to reconsider its decision on admissibility, and deferred it to the 36th ordinary session. The Commission requested the Secretariat to inform both parties of the decision and deferred consideration of the matter to the 37th ordinary session. The same decision was communicated to the parties. The Secretariat requested them to submit additional arguments on admissibility. A copy of the complainant's brief was forwarded to the respondent state, which was duly requested to forward its response.

45. On 25 October 2005, the African Commission informed the complainant of its decision to grant him an opportunity to argue for the re-opening of the communication at its 36th session.

46. At the 36th ordinary session, the African Commission, upon consideration of the arguments put forward by the complainant in his 'Brief on the Issue of exhaustion of domestic remedies', decided to reconsider its decision adopted during the 34th ordinary session, at its 37th session.

47. On 14 March 2005 the parties were informed about the decision of the African Commission and a copy of the complainant's brief was forwarded to the respondent state, which was duly requested to forward its response.

48. During the 37th ordinary session held from 27 April to 11 May 2005 in Banjul, The Gambia, the African Commission decided to defer reconsideration of the admissibility to the next session.

49. On 28 June 2005, both the complainant and the respondent state were informed of the decision. The respondent state was also reminded to forward its written submissions on admissibility within two months from the date of notification of this decision.

50. At the 38th ordinary session held in Banjul, The Gambia, from 21 November to 5 December 2005, the respondent state submitted

written arguments on admissibility. The African Commission deferred reconsideration of the admissibility of the communication to its 39th ordinary session.

51. On 16 December 2005, the Secretariat informed the parties of the decision. A copy of the respondent state's arguments was sent to the complainant.

52. On 8 March 2006, the Secretariat received from the respondent state a copy of the minutes of an August 2000 meeting between the government of Sudan, the government of Ethiopia and the UNHCR. A copy of the latter documents was transmitted to the complainant.

53. On 23 March 2006, the Secretariat received a response to the respondent state's submissions of 3 December 2005. The document was duly transmitted to the respondent state.

54. At the 39th ordinary session held in Banjul, the Gambia from 9 to 23 May 2006, the African Commission reconsidered its decision on admissibility and declared that the communication was admissible.

55. By a *note verbale* of 14 July 2006, to the Secretariat informed both parties of the aforementioned decision and requested them to submit their arguments on the merits within two months.

56. On 18 September 2006, the Secretariat received a letter from the complainant, requesting that the deadline for submission of arguments on the merits be extended by six months, as the complainant had been unable to contact the Secretariat.

57. On 16 October 2006, the Secretariat acknowledged receipt of the letter from the complainant, and reminded both parties to submit their arguments on the merits by the end of October 2006.

58. On 11 April 2007, the Secretariat received the arguments on merits from the complainant.

59. On 25 April 2007, the African Commission acknowledged receipt of the complainant's submissions and reminded the respondent state to submit its arguments on the merits by 10 May 2007.

60. On 20 June 2007, the Secretariat sent a *note verbale* to the respondent state reminding the respondent state that the African Commission intended to consider the communication on the merits during the 42nd ordinary session and requested it to forward its arguments on the merits by the end of July 2007.

61. On 6 June 2007, the Secretariat informed the complainant that the respondent state had yet to submit its arguments on the merits.

62. By a *note verbale* of 30 October 2007, the respondent state was reminded to submit its argumemts on the merits before the commencement of the 42nd ordinary session in Congo, Brazzaville.

63. On 3 November 2007, the Secretariat of the African Commission informed the respondent state that it had not yet received its submission on the merits.

64. On 23 November 2007, during the 42nd ordinary session, the respondent state submitted its arguments on the merits. The arguments were in Arabic. During the 42nd session the African Commission deferred consideration of the communication on the merits in order to allow for translation of the respondent state's submissions.

65. On 27 December 2007, the Secretariat informed the parties of its decision to defer the communication. It acknowledged receipt of the state party's brief on the merits, and also forwarded it to the complainant.

66. At the 43rd ordinary session, which took place from 7 to 22 May 2008 in Ezulwini, Swaziland, the African Commission deferred the communication to the 44th ordinary session, to give the Secretariat enough time to prepare the draft decision on the merits.

67. On 2 June 20008, the parties were informed of the decision of the African Commission.

68. During the 44th session held in Abuja, Federal Republic of Nigeria, the African Commission considered the communication and decided to defer it to the 45th session in order to finalise its decision on the merits.

69. By letter and *note verbale* of 23 January 2009, both the respondent state and the complainant were informed of the decision of the Commission.

Law

Admissibility

70. The African Commission recalls that it declared the communication inadmissible during the 34th ordinary session of the Commission. The complainant filed a request for the reopening of the case during the 35th ordinary session. This request was considered during the 36th ordinary session.

71. When declaring the communication inadmissible, the African Commission stated the following:

> Although the parties have not provided the African Commission in writing with further written submissions on the issue of local remedies, the African Commission is in a position to rule on the admissibility of this communication by making reference to the written submissions of the complainant (received on 13 March 2001) and those of the respondent state (received during the 30th ordinary session) as well as the oral submissions submitted by both parties during the 33rd ordinary session.

72. The complainant alleges that there were no effective local remedies against the government's threat to forcibly repatriate the Ethiopian refugees. The refugees had been denied the right to legal representation during the hearings that were aimed at determining whether there was any risk if they returned to Ethiopia to be tortured or be subjected to inhuman, degrading and cruel treatment.

73. The complainant submits that the procedure for repatriation agreed to by the UNHCR and Sudan was unacceptable for the following reasons: firstly, the Ethiopian refugees were given no opportunity to make representations during the decision making process, despite public announcements to this effect. Secondly, most of the interpreters/translators were taken from the Ethiopian embassy, the country from which the refugees were fleeing and they could therefore have been biased or prejudiced.

74. The complainant adds that the respondent state denied visas to the legal representatives of the refugees. By failing to ensure that the refugees were given a fair hearing in matters concerning their human rights under the African Charter, the respondent state had by doing so denied them the right to access local effective remedies.

75. The respondent state argued that there had been no complaint against illegal or forced repatriation of Ethiopians, and that this communication does not contain any concrete indication in this regard. The respondent state acknowledges that it understood the situation in Ethiopia was not favourable to those who feared persecution in their country of origin, but reassured the African Commission that every repatriation procedure in this case followed the principle of the Convention signed between Sudan, Ethiopia, and the UNHCR.

76. Furthermore, the respondent state submitted that the complainant neither approached the UNHCR nor any court or administrative body to rule on any allegations of violation committed during the process of repatriation. The complainant could have submitted an administrative application or referred the matter to the competent courts available in Sudan.

77. The respondent state informed the African Commission that article 20 of the 1996 Code of Administrative Courts gives the complainant the right to lodge an appeal against any administrative decision. An appeal could have been lodged in the Supreme Court against any administrative decision taken by the president of the republic, the federal council of ministers, the government of any region or federal or regional minister. The African Commission notes that the complainant in this communication makes no mention of any attempt on his part to access the available local remedies in the respondent state.

78. For the above reasons, the African Commission declares that communication inadmissible for non-exhaustion of local remedies.

Commission's decision on review

79. The Commission accepted the complainant's request to reconsider its decision on the basis of the submission by the complainant that the Commission had not addressed itself to its jurisprudence, regarding the exceptions to the exhaustion of local remedies rule, in particular the non-applicability of domestic remedies to situations of massive violation of human rights, as is alleged in this instance.

80. The Commission reconsidered its decision under rule 118(2) of the African Commission's Rules of Procedure. Rule 118(2) reads as follows: 'If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration.'

81. Rule 118(2) does not stipulate the conditions under which the Commission may reconsider its previous decision. The Commission may exercise its discretionary powers to reconsider its decision upon a party moving it, and adducing compelling reasons. The Commission is called upon at all times to protect human and peoples' rights. A decision to reconsider its decision must be aimed at protecting human and peoples' rights.

82. Further to that general principle, a party seeking the reconsideration or review of a decision must show that the Commission failed to take into account the criteria set out in article 56 of the Charter, or it erred in reaching the decision it did. The review must be based on the same facts as was initially before the Commission. A party cannot introduce new facts or information at the review stage.

83. The Commission has in the past, based on its jurisprudence, held that the requirement of exhaustion of local remedies does not hold '... where it is impractical or undesirable for the complainants or victim to seize the domestic courts.'[1]

84. Based on the above reasons the Commission reconsidered and departed from its previous decision and considered the parties' submissions on admissibility.

Decision on admissibility

85. The admissibility of the communications submitted under the African Charter is governed by article 56 of the African Charter. Of the seven conditions stipulated by this article, six have been met. The

[1] See consolidated comm 48/90, 52/91 and 89/93 *Amnesty International and Others v Sudan* [(2000) AHRLR 297 (ACHPR 1999)].

seventh which is article 56(5), stipulates that 'communications shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged ...'.

86. The respondent state claims that the complainant did not exhaust local remedies. It stressed that the complainant had the right to lodge an appeal against any administrative decision in accordance with article 20 of the 1996 Code of Administrative Courts, and they could lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the government of any region or to the federal or regional minister.

87. The complainant submits that the African Commission has held that

> the rule of exhausting domestic remedies is the most important condition for admissibility of communications. There is no doubt therefore, in all communications seized by the African Commission, the first requirement considered concerns the exhausting of local remedies ...[2]

The complainant argues that the reason for this rule has been defined by the Commission as a two-fold test. First, it is to give domestic courts an opportunity to decide upon cases before they are brought to an international forum. if a right is not well provided for at the domestic level, there cannot be effective remedies at all.[3]

88. Second, the complainant states that the respondent state should have notice of a human rights violation in order to have the opportunity to remedy such violation before submitting them to an International Tribunal.[4] The complainant submits that the respondent state was aware of the refugees' situation for years and did not act to protect them. The complainant alleges that there can be no doubt that the respondent state government had been put on notice of the situation giving rise to this communication. Such notice was given by the refugees themselves communicating with the government; the communications of the refugees' legal representatives with the government and coverage of the plight of the refugees by the news media.

89. The complainant submits that the respondent state responded to these communications by denying any responsibility for the plight of the refugees. The complainant states that, because of the serious violations of human rights that have occurred, the requirement that the refugees resort to domestic remedies should be deemed waived and the Commission should consider the merits of this communication.

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2 Communication 228/99, *Law Office of Ghazi Suleiman v Sudan* (2003) AHRLR 144 (ACHPR 2003) at para 29.

3 Communication 155/96, *Social and Economic Rights Action Group and Another v Nigeria* [(2001) AHRLR 60 (ACHPR 2001] para 37.

4 *Ibid* at para 38.

90. The complainant claims that when interpreting article 56(5) of the Charter, the African Commission should take into consideration generally recognized principles of international law in the interest of ensuring the protection of human rights.[5]

91. The complainant submits that the Commission has unequivocally held that when a respondent state raises the defence of non exhaustion of local remedies, it must discharge the burden by demonstrating the existence of such remedies.[6]

92. The complainant urges the African Commission to draw inspiration from regional and international human rights mechanisms on this issue. The Inter-American Court of Human Rights has repeatedly affirmed that a state has duties 'to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights.'[7] The Court held that 'the state claiming non-exhaustion of domestic remedies has an obligation to prove that the domestic remedies remain to be exhausted and that they are effective.'[8]

93. The Inter-American Commission on Human Rights expressly stated that the burden of proving that effective local remedies exist and that they had not been exhausted fell upon the government making such a claim.[9]

94. A similar view regarding the burden of proof was taken by the United Nations Human Rights Committee whereby a respondent state '... had failed to provide ... sufficient information on effective remedies.'[10] Equally, the European Court and Commission of Human Rights have held that the government shoulders the burden of proving that there are effective remedies.

95. Similarly, the Grand Chamber of the European Court for Human Rights has expressed the opinion that 'it is incumbent on the government claiming non-exhaustion of domestic remedies to satisfy the court that the remedy was an effective one, available in theory

5 See art 60 of the African Charter.

6 Comm 71/92 *Recontre Africaine Pour la Defense des Droits de l'Homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996] at para 12.

7 Exceptions and Exhaustions of Domestic Remedies (art 46(1), 46(2)(A) and 46(2)(B), American Convention on Human Rights, Inter-American Court Ser A, No11, Advisory Opinion OC-11/90 of 10 August 1990 at para 23; *Velasquez Rodriguez* case, Ser C No 4, 29 July 1988, at para 166; and *Godinez Cruz* case, Ser C No 5. 20 January 1999, at para 175.

8 *Loayza Tamayo* case, preliminary objections, Ser C No 25, 31 January 1996, at para 40.

9 Article 37(3) of the Regulations adopted in OAS Doc OAE.Ser.L.V/II.82 doc 6, rev1 at 103 (1992).

10 *Famara Kone v Senegal*, comm 386/1989, views adopted 21 October 1994, at para 5.3.

and in practice at the relevant time.'[11] The Court continued: '... that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success.'[12] Only once this burden of proof has been met does the petitioner has to establish that the local remedy 'was in fact exhausted or for some reason inadequate or ineffective in the particular circumstances.'[13]

96. The complainant urges the Commission to apply the standards articulated above, which require the respondent state to prove that effective local remedies exist in Sudan and that they are reasonably accessible. The complainant submits further that it is evident that the respondent state has not met this burden of proof. It has not shown that the refugees had adequate and effective remedies. The government had itself prevented refugees accessing any remedies — irrespective of their effectiveness and adequacy — that it alleges are available.

97. The complainant submits that communication 235/00 involves massive and serious violations of human rights. He states that the African Commission has found that actions threatening the life and welfare of less than a thousand people amount to serious and massive violations of human rights.[14]

98. The complainant alleges that the present communication involves more than 14 000 Ethiopian refugees, whose daily survival is threatened and who cannot approach the authorities for fear that their refugee identity documents would be confiscated and they would be deported without the due process of law.

99. The complainant states that the respondent state has suggested that the refugees could have theoretically relied on administrative and constitutional procedures in 'article 20 of the 1996 Constitutional and Administrative Code, and in accordance with article 120(2)(b) of the Constitution'. The complainant alleges that this would not have been an adequate remedy because the judiciary in Sudan is not independent.

100. The complainant points to the fact that the Commission noted that the respondent state had dismissed over 100 judges when it came to power approximately 12 years earlier.[15] The complainant further alleges that since 1989, the appointment of judges is done in close coordination with the president. The complainant goes on to

11 See *Akdivar v Turkey* at para 68.
12 *Ibid*.
13 *Ibid*.
14 Comm 74/92, *Commission Nationale des Droits de l'Homme et des Libertés v Chad* [(2000) AHRLR 66 (ACHPR 1995)] at paras 1-6.
15 See *Sudan* case at para 37.

state that the 1998 constitution of Sudan intentionally enhanced the powers of the president.[16]

101. The complainant alleges that on 12 December 1999, the president declared a state of emergency and prolonged his control over the judiciary until 2001. Cases brought to the court challenging this declaration of emergency have been dismissed with little or no attention to international human rights law. Instead the courts have relied on vague references to customary presidential powers that override the clear words of the constitution.[17] The complainant concludes that the Sudanese courts have been under the control of the Sudanese executive since 1989, and that an independent judiciary does not exist in Sudan.

102. The complainant submits that the respondent state has no system in place that can protect human rights in the overwhelming majority of cases. He points to examples of *Amal Aba al-Ajab v Government of Sudan case* in which the court refused to apply international human rights law.[18] He also points to a similar situation in the case of *Abdelraham et al v Sudan,* case 7/98 of 13 August 1998.[19]

103. The complainant submits that the lack of independence of the judiciary is the result of several steps taken by the Sudanese government since it came to power in 1989. He cites the reports of Mr Leonard Franco, the UN Special Rapporteur on the Situation of Human Rights in Sudan as well as numerous non-governmental organizations to demonstrate the lack of independence of the judiciary in Sudan.[20]

104. The complainant argues that although a new constitution was adopted on 1 July 1998, the executive still exercises broad powers over the judiciary: Section 5 of the Constitutional decree 13/1995, entitled 'Powers of the President' provides that 'the President shall be the guardian of the judiciary and the Council of Justice in accordance with the constitution and the law ... A judge shall be guided by the concept of supremacy of the Constitution, law and general guidance of *Sharia*.' Section 61(1-3) provides that:

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16 CF Doebbler G Suleiman 'Human rights in Sudan in the wake of the new Constitution' 6(1) *Human Rights Brief* 1,2 (1998).

17 See *Ibrahim Yusif Habani et al v Government of Sudan*, case no MD/GD/1/2000 (unreported, 8 March 2000), cited and discussed in I Bantekas and H Abu-Sabeib 'Reconciliation of Islamic law with constitutionalism: The protection of human rights in Sudan's new Constitution' (2000) 12 *RADIC* 531.

18 *Amal Aba al-Ajab v Government of Sudan*, case no MD/GD/8/99, judgment of 10 August 1999 (unreported),

19 *Abdelraham, et al v Sudan*, Case No 7/98 of 13 August 1998.

20 Human Rights Watch and the Lawyers Committee for Human Rights. These include UN Doc E/CN.4/1999/38/Add1 (17 May 1999) at para 34, UN Doc E/CN.4/2000/36 (19 April 2000) at para 11b, as well as reports by Amnesty International.

> The judiciary is responsible before the president for the performance of its functions effectively and honestly for the prevalence of justice; its function is to adjudicate fairly in constitutional, administrative, family, civil and criminal disputes and to exercise its judgment in accordance with the law.

105. The complainant alleges that Sudan is ruled under a state of emergency whereby the president exercises almost complete control over the executive, legislative and judicial functions. The complainant alleges further that for the foregoing reasons, no adequate and effective remedies exist in Sudan that the refugees should be required to exhaust.

106. The complainant submits that in the present case, the respondent state has repeatedly denied the victims access to their legal representative, Dr Curtis FJ Doebbler, by repeatedly refusing to grant him a visa to enter the country. The government has also failed to make facilities available to the refugees, even when they are in custody, to contact their legal representative.

107. The complainant rejected the submission by the respondent state that redress by way of an appeal to the UNHCR or an appeal to the Sudanese courts was available to the refugees.

108. He submitted that neither of these means of redress was adequate. An appeal to the UNHCR was ineffective because the refugees were denied legal representation. He argues that UNHCR decision makers refused to apply the African Charter on Human and Peoples' Rights and the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa. Secondly, appeals to the Sudanese courts were not possible, because there was no decision made by a Sudanese administrative body.

109. The complainant submitted that the respondent state denied responsibility for the protection of Ethiopian refugees under its jurisdiction.

110. The complainant stated that the Sudanese government's position is in contrast to the position expressed by the Commission, that: 'the Charter specifies in article 1 that the state parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also undertake ... measures to give effect to them.' Therefore, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation.[21]

111. The complainant submitted further that the process offered by the UNHCR was flawed in several serious matters. Despite repeated requests to represent the refugees in procedures before the UNHCR, the refugees were denied the right to legal representation.

[21] Comms 25/89, 47/90, 56/91 and 100/93 *Free Legal Assistance Group and Others v Zaire* [(2000) AHRLR 74 (ACHPR 1995)] para 20.

112. The UNHCR recruited translators from the Ethiopian embassy in Sudan to interview the complainants. Because the procedures applied by UNHCR, did not apply the most basic standards of due process, it cannot be considered effective or adequate for protecting the rights of the refugees that are guaranteed in the African Charter.

113. Moreover, the complainant submitted that the right to appeal from procedures that do not meet the standards of due process is illusionary and cannot be deemed an effective remedy. The refugees could not appeal a decision by the UNHCR to the Sudanese administrative bodies. Only administrative decisions made by Sudanese government authorities may be appealed. The government of Sudan itself admitted that it had nothing to do with the decision of the UNHCR. Consequently, there was no domestic remedy that could adequately and effectively protect the victims' human rights.

114. The respondent state reiterated its position that the complainant neither approached the UNHCR nor any court or administrative body to denounce the alleged violation of the rights of pre-1991 Ethiopian refugees. The respondent state stressed that the complainant could have challenged the manner in which the repatriation exercise was carried out by lodging an appeal to the Supreme Court in accordance with article 20 of the 1996 Code of Administrative Courts. Article 20 of the Code provides that anyone can lodge an appeal to the Supreme Court against any administrative decision taken by the President of the Republic, the Federal Council of Ministers, the government of any region or federal or regional minister.

115. The respondent state added that the complainant did not cite any case of refugees who had been illegally or forcibly returned to Ethiopia. The respondent state acknowledged that the situation prevailing in Ethiopia in March 2000 was not favourable to the repatriation of those refugees fearing persecution in their country of origin. It stated however that the repatriation process followed the principles laid down in the Trilateral Agreement signed between the government of Sudan, the government of Ethiopia and the UNHCR in August 2000.

116. The African Commission is of the view that, even if certain domestic remedies were available, it was not reasonable to expect refugees to seize the Sudanese courts of their complaints, given their extreme vulnerability and state of deprivation, their fear of being deported and their lack of adequate means to seek legal representation. The Commission notes that the refugees' legal representative was repeatedly denied entry into the country by the respondent state's authorities.

117. Furthermore, even accepting the argument of the respondent state that the refugees could have challenged the decision to

repatriate them before the administrative courts or appealed to the Supreme Court, the Commission holds the view, which it has stated oftentimes before, that where the violations involve many victims, it becomes neither practical nor desirable for the complainants or the victims to pursue such internal remedies in every case of violation of human rights.[22]

For all these reasons, the African Commission declares this communication admissible.

Consideration of merits

118. The present communication alleges that the respondent state has violated the human rights of an estimated 14 000 Ethiopian refugees, following the invocation by the UNHCR of the cessation clause under article 1(C)(5) of the 1951 United Nations Refugees Convention.

Complainant's submission on the merits

119. The complainant states that some time in September 1999, the respondent state and the UNHCR concluded an agreement, which *inter alia* stipulated that by 1 March 2000 Ethiopian refugees in Sudan would lose their right to work or receive any social assistance as a way of coercing them into forced repatriation.

120. The complainant states that the said refugees were subsequently repatriated involuntarily to Ethiopia, or were threatened with arrest or involuntary repatriation by the respondent state upon protesting the repatriation. Others were forced to leave Sudan for third countries.

121. The complainant alleges that the respondent state violated articles 4, 5, 6, and 12(3), (4) and (5) of the African Charter as a result of the failure to protect the Ethiopian refugees against the involuntary repatriation, and from threats of arrest. He states further that by failing to protect the refugees, it forced them to live under inhumane conditions, without the basic necessities of life. The complainant is alleging that the Ethiopians are *de facto* refugees, and thus protected by article 12 of the African Charter of Human and Peoples' Rights.

122. The complainant submits that the respondent state has an obligation to ensure respect for the right to life, the right to humane treatment and the right to security of person for every individual under its jurisdiction. It also has an obligation under article 7 of the African Charter, which requires that every individual has a right to a fair determination of his human rights as protected in the Charter.

[22] See comm 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 *Malawi African Association and Others v Mauritania* [(2000) AHRLR 149 (ACHPR 2000)] para 85.

123. The complainant draws the attention of the African Commission to article 60 of the Charter, to draw inspiration from the UN Convention on Refugees of 1951[23] and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, instruments which the respondent state has signed and ratified[24] when determining the meaning of the above articles in the Charter in relation to those instruments.

124. The complainant argues that since the African Charter is a treaty that is *later in time,* than either the UN Refugees Convention, or the African Refugees Convention, the general principle of international law to be applied to resolve any conflict between treaties is that the latter treaty prevails over the former treaty that are not compatible. The complainant relies on article 30(3) of the Vienna Convention on the Law of Treaties,[25] which states that 'the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.' He argues that by applying this principle, any provisions of the UN Refugees Convention that are incompatible with either the African Refugee Convention or the Charter must be deemed to be overridden by these latter two instruments.

125. The Commission wishes to state that it does not find any conflict or incompatibility between the African Charter and the two refugees' convention, or between the UN and the OAU Refugees Conventions. The 1969 OAU Convention stipulates that it is a complement to the 1951 UN Refugees Convention. Paragraph 9 of its preamble recognises the 1951 UN Convention and the 1967 Protocol as the basic and universal instruments relating to the status of refugees. Article VIII of the OAU Convention enjoins member states to cooperate with the UNHCR, and states further that the OAU Convention is a regional complement to the 1951 UN Convention.

126. In that respect the Commission shall read the provisions of the three instruments as complementing each other. The complainant's argument that the provisions of the latter convention prevail over the former do not in any way affect the interpretation the Commission will give to the applicable provisions, should it be necessary to do so under this communication. This is because the provisions are at most complementary to each other and not mutually exclusive.

127. Concerning the said violations, the complainant submits that the respondent state did not deny the facts as presented; rather it has merely alleged that the problem is the responsibility of the UNHCR.

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23 Convention relating to the Status of Refugees, 189 UNTS 150, entered into force 22 April 1954.

24 Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974 and ratified by the government of Sudan on 24 December 1972.

25 1155 UNTS 331, which entered into force on 27 January 1980.

He states that both the government of Sudan and the UNHCR recognized all of the refugees in the 1990s. The complainant states that while the respondent state claims that the refugees no longer need protection, the refugees, nevertheless, refute this claim. He argues that the refugees still deserve protection and, at the very least, they deserve a fair process to determine this question in each of their individual cases. He argues that since the respondent state has denied the refugees protection, and a fair determination process, it is necessary to examine the *de jure* status individually.

128. The complainant argues that both customary international law and the African Charter provide special protection to individuals who are unable to seek the protection of their own country. These persons — refugees and asylum seekers — are recognised as being in particularly vulnerable positions. States are under a legal obligation to consider refugees' claims to protection through a fair procedure and to provide them protection if their claims are found to be well-founded.

129. Referring the Commission to article 12 of the African Charter, the complainant argues that the Charter specifically recognizes the need to protect such individuals, notwithstanding that it does not define in detail who qualifies as a refugee, except to describe them as any person who is persecuted. He goes on to state that the second preambular paragraph of resolution 72/(XXXVI)/04, creating the Commission's Special Rapporteur, reiterates this protection, while also drawing states' attention to their obligations under relevant international instruments.[26]

130. The complainant further argues that the Convention Relating to the Status of Refugees is *lex specialis* in relation to the African Charter.[27]

131. He argues that the Convention Governing the Specific Aspects of Refugee Problems in Africa is *lex specialis* to both the Charter and the Convention Relating to the Status of Refugees. He states that this instrument elaborates and strengthens the definition of a refugee deserving the protection of asylum. This treaty, he maintains, extends the definition of a refugee by stating in paragraph 2 of article 1 that not only is a refugee a person as described by the UN Refugees Convention, but also that:

> The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual

[26] Preambular para 2 and para 1(g) of Commission resolution 72(XXXVI) 04.

[27] Art 1(a)(2) of the Convention Relating to the Status of Refugees. Although this treaty was once temporally limited to events occurring before 1 January 1951, this temporal restriction has been removed in countries like Sudan which have ratified the additional 1967 Protocol relating to the Status of Refugees, 606 UNTS 267 (entered into force 4 October 1967).

residence in order to seek refuge in another place outside his country of origin or nationality.

132. The complainant concludes that, in the instant case, this expanded definition applies to the Ethiopian refugees in addition to the definition in the UN Refugee Convention. This expanded definition must also be the basis of the interpretation and implementation of article 12 by the Commission because it provides individuals cumulatively the most adequate protection of their human rights in accordance with the international legal obligations that the government of Sudan has voluntarily undertaken.

Respondent state's submission on the merits

133. The respondent state in its submission states that Sudan is always committed to the implementation of international human rights instruments and continues to cooperate with the UN High Commission for Refugees which has the responsibility of monitoring international and regional conventions on refugees.

134. The respondent state denies all the complainant's allegations. It argues that as a signatory to the African Charter and various refugee instruments, it was merely cooperating with the UNHCR '... in performing its functions, and assist it in facilitating its duties and carrying out its assignments to monitor and implement the provisions' of the Geneva Convention.[28] The respondent state argues that refugees are only entitled to receive support from the UN, where fear from persecution which caused him/her to flee, still persists.

135. The respondent state argues that following the fall of Mengistu's regime in 1991, the UNHCR was of the view that the circumstances which led to the flight of Ethiopians to Sudan and to the other countries of the world, no longer existed. The respondent state states that the UNHCR believed that the situation in Ethiopia after Mengistu's fall had sufficiently changed for the return of large numbers of refugees to that country. It nevertheless argues that the announcement of the Termination of Refugee Status for Ethiopian refugees was not supposed to take place before an adequate period of time elapsed, to ensure stability and sustainability of the change in the country of origin.

136. The respondent state, quoting article 1(c) paragraphs 1 to 6, of the 1951 UN Refugees Convention, which defines the six conditions under which refugee status ceases, argues that in the case of the Ethiopian refugees, the conditions no longer justified their continued stay in Sudan. The respondent state argues that these six conditions are based on the consideration that international protection is not usually granted when it is not justified.

[28] Paras 3 and 4 of the respondent state submission on the merits.

137. It cites the cessation clause, article 1(c)(5) as the source of the current dispute, which was not only directed at the Ethiopian refugees in Sudan, but to Ethiopian refugees elsewhere in the world. The respondent state argues that indeed the UNHCR had issued similar cessation clauses in the past for other refugees from Zimbabwe, Malawi, Mozambique, Namibia, South Africa and Chile, when the situation in those countries normalised. The respondent state submitted that since Sudan hosts a large number of Ethiopian refugees, to avoid the consequences which a hasty implementation would cause to the refugees and to the Sudanese as well, it requested the Third Committee of the United Nations in New York for a gradual implementation of the cessation clause to the Ethiopian refugees in the Sudan.

138. The respondent state states that a Tripartite Agreement between Sudan, Ethiopia and the UNHCR was executed in 1993. Under this agreement a programme of voluntary repatriation began to be implemented in 1993 and continued into 1998. The respondent state submits further that, according to this agreement, 720 000 refugees returned voluntarily. However, at the end of the programme, a considerable number of the refugees remained in the Sudan.

139. The respondent state stated that, both Ethiopia and Sudan requested the UNHCR on 29 December 1999 and 1 February 2000 respectively for a postponement of the repatriation due to the outbreak of the war with Eritrea. The respondent state, Ethiopia and the UNHCR later concluded another Tripartite Agreement on 25 August 2000 to repatriate refugees at the end of the war with Eritrea, and the end of the rainy season.

140. The August 2000 agreement provided, *inter alia*, for transport modalities, provision of return packages for the returnees, such as cups, blankets, food allowances and other non food items. It also established a mechanism for a residual caseload of individuals with compelling reasons for international protection, and those who for social and economic reasons wished to remain in Sudan.

141. A screening process was carried out jointly by the Sudanese Commission on Refugees and the UNHCR to determine those who continued to need international protection. It was agreed that the regularisation for those wishing to remain in Sudan was a matter for bilateral discussion between the two governments. The screening process was envisaged to end in November 2000. Repatriation would be conducted between 1 and 31 December 2000, since food and funding would not be available in 2001. The implementation for repatriation was delayed to a later date (14 March 2001) to allow for proper implementation and assessment.

142. The respondent state argues that the UNHCR brought in the best cadres serving in different parts of the world to take part in this

exercise, so as to ensure equity and justice. The respondent state submits that the repatriation was voluntary. It denies that any refugees were imprisoned, tortured or were subjected to involuntary return. It submits further that no person was denied social services, such as medical care, food or shelter. Assistance was extended to refugees throughout up to their final place of residence. Those remaining were assisted until all phases of the implementation of the cessation clause were exhausted, including the reconciliation of their legal status.

143. The respondent state submitted further that of those who did not opt for voluntary repatriation, 282 were granted protection, while 2753 were not. The determination was done in accordance with the 1977 UNHCR Executive Committee (EXCOM) decision, which requires member states to adopt comprehensive procedures to ensure that asylum seekers are given adequate time to make an appeal for reconsideration of a decision to accredit them, to the same committee or another authority.

144. By June 2001, the respondent state had registered 7072 Ethiopians from both the 1993 to 1998, and the 2000 repatriation phases and issued them with an annually renewable residence permits, pursuant to UNHCR Executive Committee (EXCOM) decision 69, which requires member states implementing the cessation clause to make appropriate arrangements to enable persons expected to leave the country to take care of strong family and other social and economic engagements.

145. The respondent state drew that attention of the Commission to the date the communication was received at the Commission's Secretariat on the 22 February 2000. It submitted that the communication was received prior to the date of the implementation of the cessation clause. The respondent state submitted that '10 000 Ethiopian refugees actually returned to their country voluntarily in the wake of the implementation of the clause ...'. It argues that such returnees cannot be deemed to be included in the communication.

Commission's decision on merits

146. The present communication turns on issues relating to the application of two important principles in international refugee and human rights law. The first issue is the effect of the cessation clause and its application under the 1951 United Nations Convention on Status of Refugees *vis-a-vis* a state party to the African Charter. The second issue is the applicability of the *non-refoulement* principle based on the actions taken by the respondent state as a consequence of the cessation clause. The African Commission is therefore required to determine whether or not the respondent state, in applying the cessation clause, acted in a manner which amounted to the *refoulement* of refugees to their country of origin where they feared

persecution, and hence constituting a violation of the African Charter.

147. Before analysing the instant case, it is important to clarify these concepts, namely the 'cessation clause', 'refoulement' and 'non-refoulement'.

148. Article 1(c)(5) of the 1951 UN Convention on the Status of Refugees stipulates one of the six conditions which brings to an end the refugee status and hence the protection hitherto enjoyed by a refugee during asylum in a host country, after fleeing persecution or the fear of persecution in his/her home country. Article 1(c)(5) of the 1951 UN Refugees Convention reads as follows:

> This Convention shall cease to apply to any person falling under section A if he can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee ... who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

149. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa stipulates a cessation clause of its own. Article I(4)(e) reads as follows:

> This Convention shall cease to apply to any refugee if (e) he can no longer, because of the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

According to the two conventions the status of a refugee ceases when circumstances which caused the person to assume refugee status cease to exist. Such a person can no longer refuse the protection of his or her country. International protection is granted to refugees because they do not enjoy the protection of their own home countries. The cessation clause does not apply when compelling reasons arising out of previous persecution force a person to refuse the protection of one's country.

150. *Non-refoulement,* on the other hand, is a principle which has taken an increasingly fundamental character, as one of the cornerstones of international refugee law. It prohibits the return of an individual to a country in which he or she may be persecuted.[29] This principle is set out in the 1951 UN Refugee Convention, article 33(1) of which states that:

> No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.[30]

[29] Guy S Goodwin-Gill *The Refugee in international law* (2nd ed Clarendon Press, Oxford, 1996) 120. See also Lauterpacht and Bethlehem *The scope and content of the principle of non-refoulement* (UNHCR 2001).

151. The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[31] enshrines the principle of *non-refoulement* in article II(3) of this Convention. It reads as follows: '[n]o person shall be subjected by a member state to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article 1, paragraphs 1 and 2.'

152. Paragraphs 1 and 2 of article I of the OAU Convention define the conditions which compel an individual to flee the country of his habitual residence and seek asylum in another country.

153. Having seen the applicable provisions, it is incumbent upon the Commission to determine whether the respondent state violated the African Charter.

154. The complainant submitted that the respondent state denied 14 000 Ethiopian refugees the protection they deserved and a fair determination process when it executed a joint agreement with the UNHCR in September 1999, giving effect to the cessation clause by 1 March 2000.

155. Did the actions of the respondent state, in executing the joint agreement in September 1999 and posting the notice in February 2000, amount to committing a *refoulement,* ie the act of expelling the refugees? The mere execution of the agreement and posting of the notice did not constitute an act amounting to an expulsion or repatriation. The September 1999 and the subsequent notice clearly expressed the intent to apply the cessation clause. They created an atmosphere which triggered this communication even before the cessation clause implementation was set in motion. The repatriation process under the refugee conventions is conducted in a voluntary manner.

156. The respondent state, being a party to the September 1999 agreement, was thus responsible for whatever action that would follow the execution of the said agreement. The respondent state cannot blame the UNHCR for its own actions. The respondent state has however stated that it did not *refoule* the refugees. It has submitted that it did not forcibly repatriate them; it did not imprison them nor deny them the basic necessities of life as alleged by the complainant.

157. The respondent state denied that it repatriated refugees during the Eritrean-Ethiopian conflict. In fact it submitted that both Ethiopia and itself requested the UNHCR to postpone the repatriation

30 Convention Relating to the Status of Refugees, adopted July 28, 1951, art 33, UN Doc A/CONF.2/108 (1951), 189 UNTS 150 (entered into force 22 April 1954).

31 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45.

during the Ethiopian-Eritrean War. Repatriation resumed after the end of the conflict when a tripartite agreement was concluded in August 2000. The agreement provided for voluntary repatriation, inclusive of UNHCR assistance to the returnees as well as modalities for determination of a caseload of refugees who did not opt to be repatriated.

158. The respondent state stated that the refugees were not denied assistance, in spite of the notice, till the end of the repatriation programme. Two hundred and eighty two refugees continued receiving protection after the cessation clause.

159. The complainant alleged that the respondent state had mistreated the refugees for protesting their forcible repatriation. He alleged that the refugees were beaten, arrested, forcefully repatriated, and in other cases were threatened with forced repatriation for demanding to remain in Sudan for fear of persecution if they were returned to Ethiopia.

160. The African Commission wishes to state that the accounts by the two parties about the events subsequent to the cessation clause differ in certain respects. The complainant, who claimed to represent 14 000 refugees, submitted that many of the refugees did not want to return to Ethiopia because they were aligned to the opposition EPRP and feared persecution. The respondent state submitted that most of the pre-1991 refugees returned. A substantial number were granted further protection and others were issued with residence permits due to family or socio-economic reasons. The respondent state argues that by June 2001 it had issued residence permits to more than 7000 refugees who did not opt to be repatriated. At the same time it stated that other post-1991 refugees who had fled the current Ethiopian regime continued to remain in Sudan.

161. The African Commission has not found any substantive reasons to doubt the account by the respondent state. The African Commission holds that thousands of refugees repatriated voluntarily under the tripartite arrangements and those who remained were accorded refugee status or assumed normal immigrant status upon being granted residence permits.

162. The African Commission states, however, that the allegations made by the complainant could have been a case of a few refugees who feared the worst during the time immediately after the cessation clause was announced. The fear of the unknown by a substantial number of refugees who were able to communicate with their lawyer as well as the publicity generated by press reports, coupled with the frustrations of denial of visas by the respondent state to the complainant, compounded the perception that the respondent state was about to *refoule* the refugees.

163. The Commission has found no evidence that refugees were *refouled* as a result of the cessation clause. The Commission has not established any cases of imprisonment, arrest, and forcible repatriation. There was no concrete evidence brought to the attention of the Commission to the effect that such cases, if any, were linked to the promulgation and implementation of the cessation clause. The respondent state demonstrated by providing figures, which were not refuted, of refugees who repatriated voluntarily prior to and after the cessation clause, as well as those who were granted further protection or alternative solutions to repatriation. The complainant allegations that articles 4, 5, and 6 of the African Charter were violated have not been proved.

164. The complainant argues that article 7 of the African Charter requires that every individual has a right to a fair determination of the human rights protected in the Charter.

165. The respondent state denied that it violated article 7 of the African Charter. It argued that there is no uniform process for determination of refugee status and appeals under the international refugee regime. It stated that it had established a joint determination mechanism involving the Sudanese Commission of Refugees and the UNHCR to carry out determination for the refugees who did not opt for voluntary repatriation under EXCOM decision 69. The Commission, while reiterating the need to adopt judicial remedies in the event of the failure of such administrative mechanisms, takes note of the EXCOM stipulated mechanism for the reconsideration of decisions by the same committee or another authority, in the event of dissatisfaction with a decision of the Joint Committee.

166. The Commission wishes to state that the complainant raised issues which, in actual fact, had been taken care of. The communication appears to have been instituted before the implementation of the cessation clause began. Hence when implementation began, the alleged violation of the refugees' rights expressed by the complainant were eventually taken care of by the respondent state.

167. The complainant submitted that the refugees continued to consider themselves as *de facto* refugees post-the cessation clause based on paragraphs 3, 4 and 5 of article 12 of the African Charter:

> (3) Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.
>
> (4) A non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law.
>
> (5) The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.

Going by the aforesaid submission, the Commission finds that based on the information before it, there were only cases of refugees who repatriated voluntarily, or those who remained within the respondent state under various recognised legal status, namely those who retained their status or those who became immigrants upon the grant of residence permits, and the post-1991 refugees who were, in any case, not the subject of the communication. The Commission, therefore, finds that there was at no time any case of *de facto* refugees. The Commission finds that the communication was filed in anticipation of a violation, which did not happen in actual fact after the implementation of the cessation clause set in motion.

168. The complainant's allegation that article 12 of the African Charter was violated has also not been proved. The African Commission finds that the allegations concerning violations of articles 3, 4, 5, 6, 7, and 12 (3), (4), and (5) of the African Charter have not been proved.

ZIMBABWE

Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe

(2009) AHRLR 235 (ACHPR 2009)

Communication 284/2003, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Republic of Zimbabwe*

Decided at the 6th extra-ordinary session, April 2009, 26th Activity Report

Access to court to challenge legislation affecting media, measures taken to prevent media from operationg

Admissibility (disparaging language, 95-97; exhaustion of local remedies 100, unavailable and ineffective, 101, 102, 116-119, case pending before national court, 109-112)
Fair trial (right to have cause heard, clean hands doctrine, 152, 167, 172, 174)
Expression (preventing publication of newspaper, seizure of equipment, 178, 179)
Property (preventing publication of newspaper, seizure of equipment, 178, 179)
Work (preventing work by closing business premises, 179)

Summary of facts

1. This communication is jointly submitted by Associated Newspapers of Zimbabwe (PVT) Ltd (ANZ) and Zimbabwe Lawyers for Human Rights (the complainants) against the Republic of Zimbabwe (the respondent state).

2. ANZ is a company registered under the laws of Zimbabwe whose primary business is newspapers publishing. Since 1999, they have been publishing the Daily News, which is the largest-selling newspaper independent of government control in Zimbabwe.

3. The complainants state that a new media law, the Access to Information and Protection of Privacy Act (AIPPA), was enacted in 2002 by the respondent state. They claim that section 66 of AIPPA read together with section 72 purports to prohibit 'mass media

services' from operating until they have registered with the Media and Information Commission (MIC).

4. ANZ filed an application challenging the constitutionality of the provisions requiring it to register with the MIC. ANZ therefore declined to register until the question of the constitutionality of the AIPPA provisions it was challenging had been determined by the Supreme Court

5. In its judgment of 11 September 2003, the Supreme Court ruled that by not registering with the MIC, the ANZ had openly defied the law and as such were operating outside the law.

6. The complainants claim that the Supreme Court declined to rule on whether or not the aforementioned provisions of the AIPPA were consistent with the constitution but instead maintained that every law enacted in Zimbabwe remains valid and should be complied with until it is either repealed by an Act of Parliament or declared unconstitutional by the Supreme Court. In its ruling, the Supreme Court stated that 'the applicant is operating outside the law and this court will only hear the applicant on the merits once the applicant has submitted itself to the law'.

7. It is further alleged that following the Supreme Court decision, the Daily News was forcibly closed on 12 September 2003, ANZ assets were seized and several ANZ officials were arrested, while others were threatened with arrest and criminal charges.

8. Consequently, ANZ submitted its application for registration with the MIC on 15 September 2003 and on 18 September 2003, the High Court pending determination of the matter by MIC granted permission to the ANZ to publish the Daily News. The High Court also ordered the return of all the equipment seized and demanded an end to police interference with ANZ business activities.

9. On 19 September 2003, the MIC refused ANZ's application based on the Supreme Court finding that ANZ had been unlawfully operating its media business. ANZ appealed against the MIC's decision to the Administrative Court and on 24 October 2003, the Administrative Court unanimously set aside MIC's decision and held that the MIC was biased and improperly constituted. The Administrative Court also ordered the Board of the MIC to issue ANZ with a certificate of registration by 30 November 2003 failing which, ANZ would be deemed registered as from that date.

10. The complainants state that following publication of the Daily News on 25 October 2003, police immediately moved back into the ANZ offices, stopped their work and prevented all further publication.

11. The complainants argue further that since then, the authorities have prevented the re-opening of the newspaper offices. The

computers and other equipment of the company remain in the hands of the police and ANZ employees have been arrested and charged with criminal offences

12. The complainants argue that the current closure of the paper is causing irreparable harm to the freedom of expression and information and many other associative rights as delineated in the African Charter. They add that the closure is costing the ANZ 38 million Zimbabwean dollars per day in lost sales and advertising

Complaint

13. The complainants allege that articles 3, 7, 9, 14 and 15 of the African Charter on Human and Peoples' Rights have been violated.

Procedure before the African Commission

14. The communication was hand-delivered to the Secretariat of the African Commission on 12 November 2003.

15. On 4 December 2003, the Secretariat acknowledged receipt of the communication and informed the complainants that the matter would be scheduled for consideration by the African Commission at its 35th ordinary session.

16. At its 35th ordinary session held in Banjul, The Gambia, from 21 May to 4 June 2004, the African Commission decided to be seized of the communication.

17. By *note verbale* of 15 June 2004 addressed to the respondent state and by letter of the same date addressed to the complainant, the African Commission invited both parties to submit arguments on the admissibility of the communication

18. By *note verbale* dated 16 September 2004 addressed to the responding state and by letter of the same date addressed to the complainant the Secretariat of the African Commission reminded both parties to submit their arguments on admissibility.

19. On 20 September 2004 the Secretariat of the African Commission received a *note verbale* from the respondent state requesting that it be allowed to submit its arguments on admissibility by 30 October 2004.

20. By *note verbale* dated 23 September 2004, the Secretariat of the African Commission accepted the respondent state's request that it submit its arguments on admissibility by 30 October 2004.

21. On 4 October 2004, the Secretariat received a supplementary brief and arguments on admissibility on the communication from the complainant

22. By letter dated 7 October the Secretariat of the African Commission acknowledged receipt of the supplementary brief and

arguments on admissibility submitted by the complainant and by *note verbale* of the same date the Secretariat sent a copy of the said document to the respondent state.

23. On 28 October 2004, the Secretariat of the African Commission received a *note verbale* from the respondent state dated 25 October 2004 indicating that it received the supplementary brief of the complainant only on 20 October and it may not be able to submit its arguments by 30 October 2004 since the supplementary brief raises issues on the merits.

24. By *note verbale* dated 29 October 2004, the Secretariat wrote to the respondent state informing it that as the matter is still at the admissibility stage, the respondent state can submit its argument on admissibility for consideration by the African Commission at the 36th ordinary session.

25. On 29 October 2004, the Secretariat received the submission from the respondent state and by *note verbale* of 3 November 2004 acknowledged receipt thereof.

26. By letter of 3 November 2004, the Secretariat of the African Commission forwarded the response of the state to the complainant.

27. On 24 November 2004 the complainant submitted a rejoinder to the state's response and this was also hand-delivered to the state delegation attending the 30th ordinary session of the Commission.

28. At its 36th ordinary session held in Dakar, Senegal, the African Commission heard both parties on the question of provisional measures and decided to grant the complainants' request for provisional measures which called on the respondent state to return the seized equipment of ANZ. The African Commission deferred its decision on admissibility pending the state's response to the complainant's rejoinder which was handed to the state during the session.

29. By *note verbale* of 25 December 2004, the state wrote to the Secretariat seeking clarification on the deadline it was expected to make its submission. By *note verbale* of 16 December 2004, the Secretariat informed the state that the communication will be considered at the 37th ordinary session of the African Commission.

30. By letter of 16 December 2004, the Secretariat informed the complainant of the African Commission's decision taken at its 36th ordinary session in Dakar, Senegal.

31. By *note verbale* of 16 February 2005, the Secretariat reminded the state to submit its arguments on admissibility before 16 March 2005.

32. By letter of 14 March 2005, the Officer of the Attorney General of Zimbabwe requested the African Commission for an extension to allow the state submit its arguments by 31 March 2005.

33. By letter of 18 March 2005 addressed to the Attorney General, the Secretariat granted the state an extension of thirty days and requested it to submit its arguments by 18 April 2005.

34. At its 37th ordinary session held in Banjul, The Gambia, the African Commission deferred consideration on admissibility of the communication after receiving a Supreme Court ruling dated 15 March 2005 from the respondent state in which the latter claims the complainant's grievances were addressed in the Court ruling.

35. By *note verbale* of 24 May 2005, the respondent state was notified of the Commission's decision and requested to submit its arguments within three months of the notification. By letter of the same date, the complainants were notified of the Commission's decision.

36. On 14 June 2005, the Secretariat of the African Commission received a letter from the complainant in which the latter expressed concern at the Commission's decision to postpone consideration on admissibility of the communication. The complainant also expressed concern at the Commission's inaction on the state's failure to abide by its request for provisional measures.

37. On 7 July 2005, the Secretariat acknowledged receipt of the complainants' letter of 14 June 2005 and informed the complainant why the communication was deferred.

38. At its 38th ordinary session held in Banjul, The Gambia from 21 November to 5 December 2005, the African Commission considered the communication and declared it admissible.

39. By *note verbale* dated 15 December 2005 and by letter of the same date, the state and the complainants were notified of the African Commission's decision and requested to submit their arguments on the merits within three months of the date of notification.

40. By letter of 21 December 2005, the complainant acknowledged receipt of the Secretariat's letter of 15 December and indicated that it will furnish its arguments on the merits 'within the procedurally stipulated period'.

41. By *note verbale* of 6 March 2006 and by letter of the same date, the Secretariat of the African Commission reminded the state as well as the complainant to submit their arguments on the merits. Both parties were given until 31 March to do so.

42. On 3 April 2006, the Secretariat received a *note verbale* from the embassy of the Republic of Zimbabwe in Ethiopia forwarding

another *note verbale* from the Ministry of Foreign Affairs of the Republic of Zimbabwe requesting the Secretariat to extend the date of submission of its arguments to 15 April 2006.

43. By *note verbale* date 10 April 2006, the Secretariat of the African Commission acknowledged receipt of the embassy's *note verbale* and obliged to the latter's request.

44. At the 39th ordinary session of the Commission, the respondent state submitted on the merits and the Commission decided to defer further consideration of the communication to its 40th session.

45. By *note verbale* of 29 May and letter of the same date, the Secretariat of the Commission notified both parties of the Commission's decision.

46. At its 40th ordinary session the communication was deferred due to lack of time and the parties were informed accordingly.

47. At its 41st ordinary session the communication was deferred to give the Secretariat more time to prepare the draft decision. During the same session the Secretariat received a supplementary submission from the respondent state.

48. By *note verbale* of 10 July 2007, and letter of the same date, both parties were notified of the Commission's decision.

49. At its 42nd ordinary session the communication was deferred to verify the state's claim that it hadn't submitted on the merits and to allow it submit its arguments.

50. By *note verbale* of 19 December 2007, and letter of the same date, both parties were notified of the Commission's decision. The respondent state was informed that it had in fact submitted on the merits and a copy of the state's submission was sent to both parties for ease of reference.

51. At its 43rd ordinary session held in Ezulwini, the Kingdom of Swaziland the communication was deferred to allow the Secretariat incorporates the state's supplementary submission into the draft decision.

52. At its 44th ordinary session held in Abuja, Federal Republic of Nigeria, the communication was deferred due to lack of time.

Law

Admissibility

Complainants' submission on admissibility

53. The complainants submit that the Republic of Zimbabwe adopted an Act of Parliament on 13 March 2002, which obliged all media houses, journalists and all those working in the media

profession to be registered or face closure. The Associated Newspapers of Zimbabwe ('ANZ') (publishers of the Daily News and the Daily News on Sunday) challenged the provisions of the Act under section 24(1) of the Constitution of Zimbabwe (hereinafter the 'Constitution').

54. Section 24(1) of the Constitution provides that in cases involving the Bill of Rights, one may approach the Supreme Court (hereinafter the 'Court') as the court of first instance. The ANZ challenged the Act on the basis of its likelihood to infringe freedom of expression, free and uninhibited practice of journalism. According to the complainants, the Court declined to pronounce on the constitutionality of the Act and instead made a preliminary ruling that the ANZ had to and was supposed to comply with the provisions of the Act before challenging them as the ANZ was approaching the court with 'dirty hands'.

55. According to the complainants, the interpretation of the constitution by the Court was contrary to the rights and freedoms guaranteed under the Charter. They believe that the application of the judicial doctrine of clean hands by the Court had a detrimental effect on the rights of the petitioners in the domestic courts. They argue that the reliance by the Court on the common law equitable doctrine of unclean or dirty hands in a matter not of an ordinary nature but one that is dealing with fundamental human rights and freedoms grievously affects the fundamental human right to due protection of the law and further undermines the predictability in human rights related issues.

56. The complainants submit that the constitution provides that laws which are inconsistent with the Constitution are void *ab initio,* and not voidable, as seemingly was the interpretation of the Court, noting that the interpretation by the Court of this particular provision of the constitution clearly subordinates basic constitutional and human rights issues to general rules deciphered from ordinary case law mainly in English jurisdiction where their Lordships were never confronted with a matter involving violation of fundamental human rights. The unclean hands doctrine, according to the complainants, was established to deal with principles of equity and stems from the law of equity. They argue that it cannot be applied in matters relating to extent of conformity of Acts of Parliament to the Constitution in a system of constitutional supremacy, separation of powers and the power of judicial review without leading to violation and infringement of fundamental rights and freedoms.

57. The complainants submit that their contention before the Supreme Court was that the Act was contrary to the constitution and other international instruments which provide for fundamental rights and therefore sought the protection of the court and its decision on the constitutionality or otherwise of the Act. Instead of dealing with

the merits of the claim the Court applied a procedural discretionary rule of practice thereby undermining the notion of constitutional supremacy and intermittently denying the petitioners of an effective remedy.

58. The Court ruled that the ANZ had approached the Court with dirty hands therefore the Court could not attend to the merits of the case until the ANZ had obeyed the law which they deemed not to be law. Further the Court ruled that the Act was not blatantly unconstitutional.

59. The complainants argue that as provided by the Constitution, any law which is contrary to the supreme law shall be impugned. The impugning of the law or sections of it can only be achieved if the law is put under a 'constitutional compliance test', which again in terms of the Constitution, that power lies with the Supreme Court. They claim that by failing to decide on the constitutionality of AIPPA, the Court abrogated its responsibility and duties as provided by the Constitution and one can reasonably conclude that the Court was in contravention of the Constitution, the Charter and other international instruments signed and ratified by the government of Zimbabwe which provide for appeal to competent bodies and equal protection of the law.

60. According to the complainants, without approaching the court, or as in this case, the court deciding to 'shut the door in the face of the applicants', there is no other mechanisms of establishing the nature and extent of repugnancy of an Act of Parliament to the constitution. In constitutional supremacy, they argue, jurisdictions matters relating to the constitutional conformity of any law deemed to be contrary to the constitution there is no need to have that said by the court since from the onset there is no law to argue about as provided by section 3 of the Constitution.

61. As a result of the reliance on the unclean hands doctrine, the complainants believe that the Court refused to hear the arguments of the ANZ on the merits of the case thereby refusing the petitioner of equal protection before the law and appeal to competent bodies. They refer to section 24 of the Constitution which provides for the 'enforcement of protective provisions' and states that 'if any person alleges that the declaration of rights has been, is being or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may subject to the provisions of subsection (3) apply to the Supreme Court for redress.'

62. The above section they claim gives the Court original jurisdiction to enforce the provisions of the Bill of Rights, adding that the ANZ approached the Court to enforce the very same tenets establishing the Court, ie to protect fundamental rights as enshrined

in the Bill of Rights, but the Court abrogated its duty to decide on the constitutional soundness or validity of the petition.

63. The complainants submit that the absence of an effective remedy to violations of rights recognised in the convention is itself a violation of the convention by the state party in which the remedy is lacking. In that sense it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress.

64. According to the complainants, a remedy which proves illusory because of the conditions prevailing in the country, or even in the particular circumstances in a given case, cannot be considered effective, see opinion of the Inter-American Court on Human Rights.[1]

65. The complainants further argue that the determination of one's rights by a competent and impartial tribunal is a procedural guarantee provided for in the Charter, adding that to determine whether ones' rights have been violated, the national body has to make an evaluation of the facts of the case on the merits. According to them, the Supreme Court avoided dealing with the petitioner's rights and the soundness of the claim, thereby depriving the petitioners of an effective remedy.

66. The complainants finally submit that with the decision of the Supreme Court to decline to entertain the applicants, particularly given that the decision was taken by the respondent's most senior court in the land and that the decision had the unanimous approval of all the justices of the Court, local remedies have been exhausted.

Respondent state's submission on admissibility

67. The respondent state submitted its argument on admissibility on 2 November 2004. The state notes that the complainants' application is based on section 24 of the Constitution of Zimbabwe which allows anyone who feels that the Declaration of Rights contained in the Constitution is being violated in relation to him/her should apply to the Supreme Court for relief. The state notes further that in the complainants' application, they sought the nullification of the Access to Information and Protection of Privacy Act (AIPPA) on the grounds that the latter is *ultra vires* section 20 of the Republican Constitution.

68. The respondent state submits further that at the time the application was filed with the Supreme Court, the first complainant, the Associated Newspaper of Zimbabwe (ANZ) had not complied with section 66 of the AIPPA which makes it an offence to provide mass

[1] Advisory Opinion OC 9/87, also Annual Report 39/96 Case 11.673 Santiago Marzioni.

media services without registration. That the ANZ did not want to register in terms of the provisions of the AIPPA because it viewed the legislation as unconstitutional, and argued 'it [could not] on conscience obey such a law'.

69. The state added that the Supreme Court refrained from deliberating on the merits of the case, directing the complainants to 'first put its house in order', either by registering or by refraining from carrying on mass media services, and thereafter approaching the courts. The state added that the complainants did not comply with the court order but instead went ahead to continue publishing. According to the respondent state, this led to the closure of its two papers and seizure of its property by the police. According to the respondent state, the complainant subsequently made an application to register in terms of the AIPPA but this application was unsuccessful.

70. The respondent state explains the background to the AIPPA and notes that the Act was enacted by the Parliament of Zimbabwe in 2002 to, among other things:

> (a) provide members of the public with the right of access to information held by public bodies;
>
> (b) make public bodies accountable by giving a right to request correction of misrepresented personal information;
>
> (c) prevent the authorized collection, use or disclosure of personal information by public bodies;
>
> (d) protect personal privacy, to provide for the regulation of the mass media and to establish a Media and Information Commission.

71. It notes further that the regulation of the mass media constitutes part and not the sole provision of the Act, adding that prior to the enactment of the Act, there was no regulation of the press in the country and that the regulation was necessitated by a number of 'irresponsible and misleading publications in the media'. According to the state, to address the security interests of the nation as well as protect the rights of others, the rights which 'hitherto the press enjoyed without statutory limitation were thus subjected to control', adding that this was intended to instill discipline and ensure responsibility within the profession.

72. The state notes further that notwithstanding the prohibition under the Act, section 93 allows any person who was lawfully operating a mass media service at the time of the coming into force of the Act to continue practicing for a period of three months from the date of commencement of the Act. However, at the end of the three months, the necessary regulations were not in place, the period was extended to the end of December 2002. The state submits that complainant's averment that 'publication is specifically allowed by the law while any application for registration is pending', is misleading.

73. The state submits that the communication does not meet the requirements under article 56(3), (5) and (6) of the African Charter and should thus be declared inadmissible.

74. With regards to article 56(3), the state submits that the language used in the communication and its attachments is disparaging of the Supreme Court of Zimbabwe. To support this claim the state refers the African Commission to paragraphs (r) (page 6), 13, 15, 17, 18, 26, 27, 30 and 31 in the complainants' summary of facts submitted on 10 November 2003. The state submits further that on 12 September 2003, the complainants published an issue of its newspaper in which it stated *inter alia* that 'the handing down of the judgment marked a sad day for Zimbabwe's constitutional history. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell'. According to the state, this statement shows the contempt that the complainant has for the Supreme Court.

75. The state notes further that the implications of the statement and the paragraphs mentioned above includes the fact that:

- there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President;
- that the composition of the Supreme Court that heard the complainants' matter was manipulated so that a junior judge, Judge Sandura, was omitted. The state claims that the use of the word 'omitted' clearly connotes a motive by the Chief Justice to exclude Judge Sandura; and
- that the Supreme Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the government.

76. The state notes that its submission should not be taken as an attempt to curtail freedom of expression and criticism of the judiciary but is intended to protect the dignity of the judiciary, adding that the language used by the complainants go beyond mere criticism of the judiciary, that the language is discourteous, contemptuous and disparaging and is clearly intended to undermine the judiciary in the performance of its duties and hence the administration of justice. It notes further that fair criticism of the conduct of a judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in the public interest, and good faith and the public interest are ascertained from all the surrounding circumstances including the person responsible for the comments and the intended purpose sought to be achieved. The state concluded by stating that the complainants operated in apparent defiance of the law and the decision of the Administrative Court and Supreme Court and now invites the African Commission to sanction its defiance of the law and did so in a language disparaging and insulting to the judiciary of Zimbabwe. It

notes that the judiciary in Zimbabwe cannot enter into public or political controversy as such involvement will bring the judiciary into disrepute and it is therefore improper for the complainants to make such disparaging statements knowing very well that the judiciary cannot respond to the statements.

77. Regarding article 56(5) on the exhaustion of local remedies, the state notes that the complainants indeed filed an application in terms of section 24 of the Constitution to challenge the constitutionality of AIPPA and argues that the judgment on the matter is not yet out not because the process is unduly prolonged but because of the complainants' defiance of the law. The state notes that the complainants, after refusing to comply with the AIPPA chose to comply with it later and is still pursuing its challenge of its constitutionality and if the complainants are successful, they will be able to resume operations without going through the registration process.

78. The state notes that as at when the complainants were submitting the communication to the Commission during the 34th ordinary session in November 2003, there was an application in the Supreme Court they were pursuing to challenge the constitutionality of the AIPPA. The state notes further that the Minister of State for Information and Publicity and Cabinet appealed a decision that the complainants should publish by 30 November 2004.

79. The state notes further that the provisional order sought by the complainants demonstrates that it has not exhausted local remedies. The state referred the African Commission to the complainants' statement in page 6 paragraph (r) that

> [a]s a provisional measure necessary to uphold and protect the rights contained in the Charter and avoid irremediable damage, complainants ask the Commission to request that ANZ's computers and equipment be returned and it be allowed to resume publication on the Daily News immediately, until its question whether the impugned sections of the Zimbabwe statute are consistent with the provisions of the Constitution of Zimbabwe has been properly heard and determined by an impartial tribunal.

80. The state also submitted that it is misleading for the complainants to argue that the Supreme Court did not consider the question of admissibility as the Court made an obiter statement on the question of constitutionality. The respondent states finally notes that appeal by the government of the Republic against the decision of the Administrative Court was heard together with the complainants' constitutional application and judgment is awaited and as such, the African Commission cannot entertain the communication until all local remedies have been exhausted.

African Commission's decision on admissibility

81. The current communication is submitted pursuant to article 55 of the African Charter which allows the African Commission to receive and consider communications, other than from state parties. Article 56 of the African Charter provides that the admissibility of a communication submitted pursuant to article 55 is subject to seven conditions.[2] The African Commission has stressed that the conditions laid down in article 56 are conjunctive, meaning that, if any one of them is absent, the communication will be declared inadmissible.[3]

82. The complainants in the present communication argue that it has satisfied the admissibility conditions set out in article 56 of the Charter and as such, the communication should be declared admissible. The respondent state on its part submits that the communication should be declared inadmissible because, according to the state, the complainants have not complied with article 56(3), (5) and (6) of the African Charter.

83. Article 56(3) of the Charter requires that communications submitted to the African Commission are not written in disparaging or insulting language directed against the state concerned and its institutions or to the Organization of African Unity (or African Union).

84. In the present communication, the respondent state argues that the communication is written in a language insulting to the judiciary of the state. The state avers that the complainants published an issue of its newspaper (The Daily News) on 12 September 2003 in which it stated *inter alia* that 'the handing down of the judgment marked a sad day for Zimbabwe's constitutional history. I suppose we should be immensely thankful that we are not prisoners on death row because the practical effect of this judgment is that had we have been challenging the death penalty and not AIPPA , we would have had to hang first and challenge the penalty from hell'. According to the state, this statement shows the contempt that the complainants have for the Supreme Court.

85. The state claims further that by stating in the communication that a judge of the Supreme Court — Judge Sandura, was omitted from the case complainants were insinuating that the composition of the Supreme Court was manipulated. The state claims that the use of the word 'omitted' in the communication clearly connotes a motive by the Chief Justice, who selects judges to sit on a case, to have excluded Judge Sandura and that there is bias in the appointment of judges of the High Court and the Supreme Court because they are appointed by the President, and that that the Supreme Court was biased towards the government and therefore acted not as the judiciary but as a political agent of the government.

2 See article 56 of the African Charter.
3 See African Commission, Information Sheet 3.

86. In response to the state's allegation of disparaging language, the complainants refuted the allegation and noted that the language was necessary in that it sought to describe the effect of the judgment on the complainants. The complainants also described a number of situations in which it claims the respondent state itself had made 'uncharitable remarks against the same judiciary' which they consider as insulting and disparaging and far removed from the 'criticism that is contained in the complainants' brief' which according to them 'are aimed at showing the absence of a local remedy in the light of the decision by the Supreme Court'.

87. The fundamental question that has to be addressed in the present communication is how far one can go in criticizing a judge or the judiciary in the name of free expression, and whether the statement made by the complainants constitutes insulting or disparaging language within the meaning of Article 56(3) of the African Charter. Indeed, the communication invites the Commission to clarify the ostensible relationship between freedom of expression and the protection of the reputation of the judiciary and the judicial process.

88. The operative words in sub-paragraph 3 in article 56 are 'disparaging' and 'insulting' and these words must be directed against the state party concerned or its institutions or the African Union. According to the Oxford Advanced Dictionary, disparaging means 'to speak slightingly of ... or to belittle' and insulting means to 'abuse scornfully or to offend the self respect or modesty of'.

89. The judiciary is a very important institution in every country and cannot function properly without the support and trust of the public. Judges, by the very nature of the profession, speak in courts and courts only. They are not at liberty to debate or even defend their decisions in public. This manner of conducting the business of the courts is intended to enhance public confidence. In the final analysis, it is the people who have to believe in the integrity of their judges. Without such trust, the judiciary cannot function properly, and where the judiciary cannot function properly the rule of law must die. Because of the importance of preserving public trust in the judiciary and because of the reticence required for it to perform its arbitral role, special safeguards have been in existence for many centuries to protect the judiciary against vilification. One such protective device is to deter insulting or disparaging remarks or language calculated to bring the judicial process into ridicule and disrepute.

90. The freedom to speak one's mind and debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual officers. A clear line cannot be drawn between acceptable criticism of the judiciary and statements that

are downright harmful to the administration of justice. Statements concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. Because of the grave implications of a loss of public confidence in the integrity of the judges, public comment calculated to bring the judiciary into disrepute and shame has always been regarded with disfavor.

91. In determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence on the administration of justice. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute. To this end, article 56(3) must be interpreted bearing in mind article 9(2) of the African Charter which provides that 'every individual shall have the right to express and disseminate his opinions within the law'. A balance must be struck between the right to speak freely and the duty to protect state institutions to ensure that while discouraging abusive language, the African Commission is not at the same time violating or inhibiting the enjoyment of other rights guaranteed in the African Charter, such as in this case, the right to freedom of expression.

92. The importance of the right to freedom of expression was aptly stated by the African Commission in communications 140/94, 141/94, 145/94 against Nigeria[4] when it held that freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and to his participation in the conduct of public affairs in his country. Individuals cannot participate fully and fairly in the functioning of societies if they must live in fear of being persecuted by state authorities for exercising their right to freedom of expression. The state must be required to uphold, protect and guarantee this right if it wants to engage in an honest and sincere commitment to democracy and good governance

93. Over the years, the line to be drawn between genuine criticism of the judiciary and insulting language has grown thinner. With the advancement of the politics of human rights, good governance, democracy and free and open societies, the public has to balance the question of free expression and protecting the reputation of the judiciary. Lord Atkin expressed the basic relationship between the two values in *Ambard v A-G of Trinidad and Tobago* (1936) 1 All ER 704 at 709 in the following words:

[4] [*Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999)].

> but whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public act done in the seat of justice. The path of criticism is a public way ... Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even through outspoken comments of ordinary men

94. More recently Corbett CJ in *Argus Printing and Publishing Co Ltd v Esselen's Estate* (1994) 2 SA expressed the modern balance as follows:

> Judges, because of their position in society and because of the work which they do, inevitably on occasion attract public criticism and that it is right and proper that they should be publicly accountable ... Criticism of judgments, particularly by academic commentators, is at times acerbic, personally oriented and hurtful ... To some extent what in former times may have been regarded as intolerable must today be tolerated ... This, too, will help maintain a balance between the need for public accountability and the need to protect the judiciary and to shield it from wanton attack

95. In an open and democratic society individuals must be allowed to express their views freely and especially with regards to public figures, such views must not be taken as insulting. The freedom to speak one's mind is now an inherent quality of a democratic and open society. It is the right of every member of civil society to be interested in and concerned about public affairs – including the activities of the courts.

96. In the present communication, the respondent state has not established that by stating that one of the judges of the Supreme Court was 'omitted' the complainants has brought the judiciary into disrepute. The state hasn't shown the detrimental effect of this statement on the judiciary in particular and the administration of justice as a whole. In its submission to the Commission, the complainants indicated that '[t]he judges who issued the judgment sat as the country's constitutional court, constituted as usual by a bench of five. The country only has six Supreme Court judges. The most senior judge, Justice Sandura, was *omitted* from the Court's line-up, but he cannot now constitute a new bench, either by sitting alone or by sitting with acting judges of appeal.' In the opinion of the Commission, the complainants were simply stating a fact — a fact to demonstrate that in their view, it had approached the highest judicial body in the country. The use of the word 'omitted' can not in the Commission's view be seen as disparaging or insulting to the judiciary. There is no evidence to show that it was used in bad faith or calculated to poison the mind of the public against the judiciary.

97. With regards the respondent state's claim that the complainants published an article with disparaging language in their newspaper edition of 12 September 2003, the African Commission cannot make a pronouncement on the same as the purported statement does not form part of the complaint submitted to the Commission. Article 56(3) of the Charter requires that

communications submitted to the African Commission are not written in disparaging or insulting language. Communications within the meaning of articles 55 and 56 refer to the complaints submitted by petitioners. These complaints invariably include other documentations submitted by the petitioner to support their case, such as annexes. Documents supplied by third parties or the respondent cannot and should not form part of the complaint. In the present communication, neither the complaint itself nor the annexes thereto made reference to the statement purportedly published by the complainant in its newspaper edition of 12 September 2003. For the above reasons, the Commission decline to uphold the respondent state's argument that the communication is written in disparaging and insulting language.

98. With regards the exhaustion of local remedies, complainants submit that domestic remedies are ineffective, that the respondent state has been given the opportunity to remedy the grievance submitted before the Commission but the state, through its courts, has proved unable to do so. The respondent state on its part argues that the matter is still before the Supreme Court, the highest court in the country, and has been pending before the Court simply because of the complainants' 'defiance of the law'.

99. It is a well established rule of customary international law that before international proceedings are instituted, the various remedies provided by the state should have been exhausted. The principle of the exhaustion of local remedies is contained in article 56(5) of the African Charter and provides that communications relating to human and peoples' rights referred to in article 55 received by the African Commission shall be considered if they 'are sent after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged'.

100. International mechanisms are not substitutes for domestic implementation of human rights, but should be seen as tools to assist the domestic authorities to develop a sufficient protection of human rights in their territories. If a victim of a human rights violation wants to bring an individual case before an international body, he or she must first have tried to obtain a remedy from the national authorities. It must be shown that the state was given an opportunity to remedy the case itself before resorting to an international body. This reflects the fact that states are not considered to have violated their human rights obligations if they provide genuine and effective remedies for the victims of human rights violations.

101. The international bodies do recognize however, that in many countries, remedies may be non-existent or illusory. They have therefore developed rules about the characteristics which remedies should have, the way in which the remedies have to be exhausted and special circumstances where it might not be necessary to exhaust

them. The African Commission has held that for the domestic remedies referred to in article 56(5) of the Charter to be exhausted they must be 'available, effective and sufficient'. If the domestic remedies do not meet these criteria, a victim may not have to exhaust them before complaining to an international body. However, the complainant needs to be able to show that the remedies do not fulfil these criteria in practice, not merely in the opinion of the victim or that of his or her legal representative.

102. If a complainant wishes to argue that a particular remedy does not have to be exhausted because it is unavailable, ineffective or insufficient, the procedure is as follows: (a) the complainant states that the remedy did not have to be exhausted because it is ineffective (or unavailable or insufficient) — this does not yet have to be proven; (b) the respondent state must then show that the remedy is available, effective and sufficient; and (c) if the respondent state is able to establish this, then the complainant must either demonstrate that he or she did exhaust the remedy, or that it could not have been effective in the specific case, even if it may be effective in general.

103. In the present communication, the complainants and the respondent state seem to have reached what the Commission would call a 'legal impasse'. The complainants argue that the domestic remedy provided by the respondent state is ineffective and cannot remedy their grievance, while the state contends that the remedy is available and effective but the complainants' defiance of the law has prevented them from using it. Usually, when there is a legal disagreement between two parties, the appropriate national institution to resolve that disagreement is the domestic courts. In the present communication, the complainants have been to the highest court of the country and the latter refused to hear and determine complainants' grievance on the merits claiming complainants have approached it with dirty hands. Complainants argue that on matters of fundamental human rights, as is the case with the present communication, the dirty hands doctrine invoked by the Supreme Court cannot be used as it would be undermining the supremacy of the constitution. According to the complainants therefore, the domestic remedy available is not effective because it is incapable of redressing the grievance and that is why the matter has been referred to the Commission.

104. A brief account of the circumstances of the case would be helpful to determine whether complainants' argument that there is no effective remedy or the state's contention that the complainants haves not exhausted domestic remedies is correct.

105. On 15 March 2002, the respondent state enacted a law, the Access to Information and Protection of Privacy Act which required media practitioners to register their businesses before operating in the country. In terms of section 93 of the Act, any person who

immediately the Act became law was publishing a newspaper was deemed to be lawfully registered for a period of three months, that is, up to 15 June 2002. It was envisaged that those who were required to register would apply and be registered within the three months period. However, the Regulations to the Act prescribing the various forms that had to be used for registration were published only on the date the three months was due to expire, 15 June 2002. This means that no application for registration could be made before 15 June 2002. To cater for this delay, section 8(2) of the regulations provides that once a person has submitted an application for registration, then that person is permitted to carry on mass media activities while the application is being considered.

106. Meantime, the complainants sought to challenge the constitutionality of the Act claiming the Act was unconstitutional and thus null and void *ab initio*. The complainants applied to the Supreme Court for an order declaring certain provisions of the Act a nullity. The application was heard on 3 June 2003. On 11 September 2003, the Supreme Court handed down a ruling that it was not prepared to hear and determine the merits of the case until the applicant (the complainants) had registered, that is, comply with the Act. A day after the ruling, that is, 12 September 2003, complainants published an edition of their newspaper, the Daily News. That same day, police visited the premises of the complainants and evicted all employees there from.

107. After discussions with the police on 13 September 2003, complainants were given permission to enter the premises with a few staff to prepare documents to apply for registration. On 15 September 2003, complainants' submitted application for registration to the Media and Information Commission and the application was duly acknowledged on the same day. On 16 September 2003, respondent's agents — the police, raided the premises of complainants seizing equipment — computers, printers and other office accessories belonging to Complainants. On 17 September complainants went to the High Court seeking an order that respondent vacates the premises and restore possession and control thereof to them and return all goods and equipment removed from the premises. On 18 September, the High Court ruled in favour of the complainants and ordered the respondent to return the property. The Court also noted that in terms of section 8(2) of the regulations, the respondent has no legal right to prevent the applicant and its employees from gaining access to the premises of the applicant and carrying on its business of publishing a newspaper.

108. On 19 September 2003, the MIC informed the complainants that its application for registration could not be granted because complainants have been operating illegally even after the Supreme Court Order of 11 September 2003 and that the complainants had

failed to accredit is journalists. On 23 September 2003, the complainants lodged an appeal with the Administrative Court of Zimbabwe against the decision of the MIC claiming that MIC was improperly constituted, acted *ultra vires* and that the Chairperson of the MIC was biased. On 24 October 2003, the Administrative Court upheld the arguments of the Complainants and ordered the MIC to grant a certificate of registration to the Complainants by the 30th of November 2003. Before the certificate could be issued and before 30 November 2003, complainants went ahead and published on 25 November 2003, another edition of its newspaper – the Daily News. The respondent state claims it has appealed the decision of the Administrative Court and it is this appeal which the state is claiming is still before the courts and thus domestic remedies have not been exhausted.

109. In view of the above scenario, it is apparent to the African Commission that there are two matters that the complainants have taken to the courts of the responding state. The one is a matter to declare the AIPPA unconstitutional, which the Supreme Court on 11 September 2003 declined to entertain on condition that complainants comply with AIPPA — the same Act they sought to challenge before the Court. The second matter brought before the Administrative Court is the one to appeal against the decision of the Media and Information Commission not to grant the complainant registration to operate media services. The Administrative Court ruled in favour of the complainants and the state claims to have appealed the decision.

110. Both matters originate from the complainants' desire to challenge the AIPPA. The matter for which the African Commission is called upon to decide is clear. It is the decision of the Supreme Court not to rule on the complainants' challenge of the constitutionality of AIPPA. After the Supreme Court decision of 11 September 2003, the complainants argue that there was no other court available in the country to hear the matter. Since the complainants disagreed with the reasoning of the Supreme Court for not making a determination on the merits of the matter and since the court sat as the highest court in the land on the matter, there was no other avenue for appeal. As far as the complainants are concerned, the only domestic remedy available, the Supreme Court, was not able to deal with the particular case and as such was ineffective. The complainants therefore approached the African Commission to seek redress. The communication to the African Commission was submitted on 12 November 2003, twelve days before the decision of the Administrative Court on another matter — that dealing with the MIC's refusal to grant the complainants a registration certificate.

111. In the opinion of the African Commission, the two cases, though stemming from the same matter, cannot be considered as pending before the courts of the respondent state. The appeal of the

respondent on the administrative court's decision has no bearing on the case before the African Commission, because the respondent state has not established that the complainants intend to use the outcome of that case to revert to the Supreme Court to hear its original application on the constitutionality of AIPPA. Also, the fact that the complainants submitted the present communication to the Commission while the appeal on the other case was still pending indicates that the outcome of the appeal had no bearing on the case submitted to the Commission. There is no information submitted to the African Commission to the effect that the matter before it is on appeal. What the Commission knows is that the Supreme Court refused to hear the matter on the merits and ordered complainants to go and put its house in order. Complainants have not indicated that they intend to put their house in order and revert to the court.

112. In view of the above, the African Commission is of the view that the matter for which the state has appealed is not before it and has not been brought to it by any of the parties. However, on the matter submitted to it by the complainants, the latter has demonstrated that it has seized the highest court in the country and could not get appropriate remedy.

113. It is immaterial at this stage to discuss why the Supreme Court refused to hear the complainants' case. What the complainants need to do is to satisfy the African Commission that it approached the Supreme Court with the current grievance and failed to get remedy. This, in the opinion of the Commission, has been aptly demonstrated.

114. Regarding the Supreme Court ruling of 14 March 2005, the African Commission recognises the fact that the parties to the case are the same, that the subject matter is similar to those brought by the complainants before the same Supreme Court in June 2003 and which the latter ruled on 11 September 2003 against the complainants.

115. The question before the African Commission at this stage is not to determine whether the complainant have, subsequent to the submission of the communication to the Commission, had their grievances resolved, but rather whether at the time of submitting the communication, domestic remedies were available, effective and sufficient.

116. The African Commission has held that a remedy is considered available if the petitioner can pursue it without impediment. In communication 147/95 and 149/96, the Commission held that a remedy is considered available only if the applicant can make use of it in the circumstances of his case. It is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint.[5]

117. The facts as presented before the African Commission indicate that at the time the communication was submitted the complainants had approached the highest court in the respondent state — the only domestic remedy available to address the grievance. The Court declined to make a determination on the merits of the case brought by the complainants requiring the complainants instead to undertake an action which was the very subject matter of the application.

118. By refusing to make a determination on the merits of the case and by 'forcing' the complainants to perform that which it was challenging before the court, the Supreme Court effectively demonstrated its inability to address the question put to it by the complainants and made domestic remedies unavailable and ineffective in the instance of the complainants' case and left the latter with no other alternative than to resort to the international forum to seek protection.

119. The availability of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. Therefore, if the applicant cannot turn to the judiciary of his country because he is required by the same judiciary to first of all recognise that which he is challenging, local remedies would be deemed to be unavailable to him. In the present communication, that seems to have been the case.

120. The respondent state, without elaborating, also argues that the complainants have not complied with article 56(6) of the African Charter. This sub-article provides that communications referred to under article 55 of the Charter shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter. The communication was received at the Secretariat of the African Commission on 12 November 2003, two months after the Supreme Court refused to hear the matter on the merits. It is the opinion of the Commission that the communication was submitted within a reasonable time.

121. For the above reasons, the African Commission declines to grant the respondent state's request for the communication to be declared inadmissible and upholds the complainants' arguments that all the conditions under article 56 have been met and thus declares the communication admissible.

Submissions on the merits

Complainants' submissions on the merits

[5] *Jawara v The Gambia*, communication 147/95 and 149/96 [(2000) AHRLR 107 (ACHPR 2000)].

122. The complainants submit that, the respondent state's court, by invoking the dirty hands doctrine and refusing to hear their case, violated their rights guaranteed in articles 3, 7, 9, 14 and 15 of the African Charter. The complainants are not asking the Commission to pronounce on the compatibility of the AIPPA to the African Charter.

123. Regarding the alleged violation of article 3, they submit that the failure of the Supreme Court to decide whether the AIPPA was unconstitutional was a violation of their right to equal protection of the law, adding that this refusal collides not only with the letter and spirit of the Charter but more so with universal law as expressed in several other documents such as article 2(b) of the International Covenant on Civil and Political Rights, article 8 of the Universal Declaration of Human Rights, as well as articles 7 and 26 of the African Charter.

124. According to the complainants, the relief sought by ANZ was a determination of the constitutionality or otherwise of an Act of Parliament, and the Court was supposed to decide on the facts of the alleged violations and 'not on the presumption of non-compliance with an Act of Parliament'. That by deciding on a procedural aspect on a principle of equity which was not applicable to matters pertaining to human rights, the Court denied the ANZ the right to equal protection before the law as provided in the Charter.

125. The complainants argue that the right to equal protection of the law is guaranteed in the Constitution of the respondent state thus: 'any one who has reason to belief that his fundamental rights are about to be violated or are likely to be violated can petition the court for its immediate intervention'. The complainants submit that 'to then rely on a doctrine of equity addressing an issue which is believed to stem from the rights protected by the constitution will not only be depriving the petitioner of an effective remedy but also denial of the right to protection of the law'.

126. Regarding allegation of violation of article 7, complainants argue that by refusing to hear the merits of their petition, the Supreme Court proved to be ineffective in acting both as the court of first instance in matters relating to human rights, and in their case, as final tribunal. They argue that for an appeal to a competent body to be considered to be effective, there must be an equally effective decision to remedy the violation of the right of the petitioner. The decision that results from the appeal need not be favourable to the petitioner but it must be considered effective in so far as it addresses the petition.

127. The complainants argue further that the right to appeal to competent authorities on allegation of human rights violations should not be dealt with on procedural aspects only, but the competent body, in this case the Supreme Court, should make a decision based

on the merits of the petition. According to the complainants, in their case, the court denied them the right to be heard and therefore denying them justice.

128. The complainants indicate that the determination of one's rights by a competent tribunal is a procedural guarantee provided for in the Charter. To determine whether one's rights have been violated, the national body has to make a determination on the merits of the petition. In the present case, they argue, the Supreme Court refused to determine the merits of the case thereby depriving them of an effective remedy. The complainants go further to state that the application of the clean hands doctrine in matters relating to constitutional challenges actually results in legal unpredictability and could ultimately lead to disorder, adding that non-judicial decision of a *bona fide* case deprives litigants as well as future actors of that knowledge of effective remedies, and the fact that an Act has been passed into law does not preclude one from challenging its constitutionality and the notion of complying with an illegality first does not tally with the notion of constitutional supremacy and laws which are not in conformity with the constitution are void *ab initio*.

129. The complainants further submit that by declining to decide on the constitutionality of the AIPPA, the Court abdicated on its primary duty as the protector of fundamental human rights and denied the petitioners the right to be heard and the protection of the law.

130. In conclusion, the complainants submit that the role of the African Commission in the matter is not to interpret the law being challenged or declare that the decision of the domestic court was unconstitutional, but it is rather to establish whether the decision of the court is in violation of the Charter. They implore the Commission to find that by applying the unclean hands doctrine in matters relating to constitutional rights, the Supreme Court of Zimbabwe violated the rights guaranteed in the Charter, in particular, equal protection of the law, fair trial and the right to appeal to competent bodies.

Respondent state's submissions on the merits

131. In its submissions, the respondent state argues that all the complainant's submissions are without merit. The state cited the Supreme Court decision in *Association of Independent Journalists and Others v Minister of State for Information and Publicity and others*, where it was held that any law that seeks to regulate the practice of journalism has to conform to the stringent requirements for a law abridging the right conferred by section 20 of the Constitution in order to be valid. The state emphasised that the Media Commission does not have any discretion and that anybody who complies with the requirements of section 79 is entitled to accreditation. According to the state, the implication is that, if the requirements are too

onerous, then the regulations, including section 83 which prohibits practicing as a journalist without accrediation, could be held to be unconstitutional.

132. The complainants indicate that, regulations require personal information which includes marital status, national identity number, residential address, criminal record and details of accreditation to a specific media house. They claim that for purposes of licensing, these requirements cannot be said to be onerous.

133. According to the respondent state, statistics held by the Media and Information Commission portrayed that none of these requirements are onerous.

134. The respondent state argues that the complainants' claim that it is dangerous for journalists to disclose their residential address for fear of arrest after midnight cannot go unchallenged because there is no prove as to the fact that any journalist has been arrested at midnight after having filed the application for accreditation.

135. The respondent quotes article 9(2) of the African Charter, where the African Commission in interpreting the phrase 'within the law' has said that the authorities should not override constitutional provisions and fundamental rights guaranteed by the constitution and International human rights standards.[6] The respondent recognises that national law cannot set aside the right to express and disseminate information which is recognised under international law.

136. Furthermore, the state contends that the Charter recognises the right of the state to justify resorting to limitation of the right which has to be justifiable in terms of international practice, and measures taken must be in line with protected interest, adding that section 20(1) of the Zimbabwe Constitution is in line with article 9(2) of the Charter. The Constitution provides for derogration of a fundamental right where the derogration is according to law.

137. The respondent state submits further that, the legislation applies to all media houses and practitioners who wish to practice in Zimbabwe without posing any threat to the right of the public to receive information.

138. In addition to the above, that mere registration of the media does not inhibit the practice of journalism and that the complainants' submission does not portray how exercise of that right is curtailed by the requirement of registration. The state quotes the wordings of article 13 of the European Convention which grants an absolute right as opposed to article 9(2) of the African Charter, adding that the interpretation by the American Convention is different from that in article 10.1 of the European Convention which empowers legislation

6 Communication 101/1993 [*Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995)].

in respect for licensing of broadcasting, television and cinema, and article 9 of the African Charter which allows for the exercise of the right. Therefore, the state asserts, within the African Charter provisions, there is nothing that stops both technical and journalistic regulation as long as it is in accordance with the Charter.

139. The respondent state contends that, the objective of regulating journalists is not to control them and to prevent or limit critical journalism, rather it is within the ambit of allowable derogations within the Charter.

140. According to the respondent, the provisions being challenged by the complainant may cause inconveniences to journalists. However, that they are not arbitrary and oppressive and do not violate the right of freedom of expression.

141. The state further submits that, the accreditation of journalists and licensing of the media is constitutional and compliant to the Charter.

142. The respondent therefore submits that both sections 79 and 80 of the AIPPA are not in contravention of article 9 of the Charter. Furthermore, that the provisions of article 27(2), in line with section 20(1) of the Constitution and section 80 of the AIPPA provide that the rights and freedoms of each individual shall be exercised with due regard to the rights, collective security, morality and common interest.

143. The respondent state therefore prays that the Commission finds that the legislation in question does not violate article 9 of the Charter as alleged by the complainant.

Respondent state's supplementary submissions on the merits

144. During the 41st ordinary session, the respondent state made a supplementary submission claiming that it never received the complainant's submissions on the merits prior to submitting its original submission on the merits, adding that the supplementary submissions was meant to address the issues raised by the complainants.

145. In its submissions, the respondent state notes that complainants argue that there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalists and hence no need for further legislation, that registration requirements are unduly intrusive and burdensome, and that compliance with the requirements does not necessarily guarantee registration of a journalist as the MIC has the discretion to decide whether or not to register a journalist. The respondent state claims that each of the complainants' submissions referred to above and elsewhere are without merit.

146. The African Commission finds that supplementary submission of the respondent state does not depart from its earlier submission summarised in paragraphs 131-143 of this decision.

The African Commission's decision on the merits

147. In the present communication, the Commission is called upon to make a determination whether the decision of a domestic court, the highest court of the land in the respondent state, not to hear a petition brought by the complainants because the latter came before the court with 'dirty hands', is a violation of the Charter. In other words, did the Supreme Court violate the rights of the complainants by invoking the equitable doctrine of 'he who comes to equity must come with clean hands'? The Commission is not called upon to determine the constitutionality of the AIPPA which was the subject at issue before the Supreme Court. The Commission is also not called upon to determine whether the AIPPA or provisions thereof, violate the African Charter. It is called upon to determine whether by invoking the dirty hands doctrine, the respondent state, through its court, violated the right to have the complainants' cause heard, as guaranteed under article 7(1)(a) of the African Charter.

What is the clean hands doctrine?

148. According to the Black's Law Dictionary (2000), the clean hands doctrine is an equitable principle which requires that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle such as good faith. It bars relief to persons who are guilty of misconduct in the matter for which they seek relief. It is a positive defense that is available where the complaint by the claimant is equitable.

149. Normally, equitable relief is generally available when a legal remedy is insufficient or inadequate to deal with the issue. These rights and procedures were created to provide fairness, unhampered by the narrow confines of the old common law or technical requirements of the law. It was recognised that sometimes the common law did not provide adequate remedies to solve all problems hence the creation of the courts of equity by the monarch.

150. However, in modern days, separate courts of equity have largely been abolished and the same courts that may award a legal remedy have the power to prescribe an equitable one. With time, certain aspects of equity were imported into the law and one such import is the doctrine of clean hands.

151. It is notable also that it is quite a controversial doctrine particularly in the sphere of public law where the formulation is that the responsibility of the state is not engaged when the complainant has acted in breach of the law of the state. However, as an equitable

rule extended to the domain of law, it is necessary to be cautious when applying it particularly in cases where fundamental legal/ human rights are involved.

152. In the present communication, the relief sought by the complainants before he Supreme Court was a determination by the court whether an Act of Parliament, enacted by the respondent state, violated or was likely to violate their fundamental rights guaranteed under the constitution, and other international human rights instruments, including the African Charter. According to the Supreme Court, the petition could not be entertained because the complainants approached the court with dirty hands. They (the complainants) had refused to comply with the very law they approached the court to challenge. The court thus invoked the equitable doctrine of 'he who comes to equity must come with clean hands', and refuse to entertain the complainants' request for the court to determine the constitutionality of the Act they were challenging.

153. The question before the Commission is whether the Supreme Court, by invoking the clean hands doctrine, and refusing to entertain the merits of the petition of the complainants, violated the rights of the complainants and in effect, the African Charter.

Alleged violation of article 3

154. The complainants allege the violation of Article 3 of the African Charter. This Article provides that: 'Every individual shall be equal before the law, and every individual shall be entitled to equal protection of the law.' According to the complainants, by applying the unclean hands doctrine and refusing to hear the merits of their case, the Supreme Court of Zimbabwe violated the right to equal protection of the law guaranteed under article 3 of the African Charter. The state did not address itself to this allegation.

155. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country. The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

156. The most fundamental meaning of equality before the law provided for under article 3(1) of the Charter is the right by all to have the same procedures and principles applied under the same conditions.

157. The right to equality before the law means that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. With respect to article 3(2) on the right of equal protection of the law, the African Commission in

its decision in *Zimbabwe Lawyers for human Rights and the Institute for Human Rights and Development v Republic Of Zimbabwe*,[7] relied on the Supreme Court decision in *Brown v Board of Education of Topeka*,[8] in which Chief Justice Earl Warren of the United State of America argued that 'equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.[9]

158. In order for a party to establish a successful claim under article 3 of the Charter, it should show that, the respondent state has not given the complainant the same treatment it accorded to the others in a similar situation. Or that, the respondent state had accorded favourable treatment to others in the same position as the complainant.

159. In the present communication, the Commission notes that the complainants have not demonstrated the extent to which the courts treated them differently from the respondent state or from any other party in a similar situation. This seems to be the first instance where the Supreme Court is approached to deal with the kind of matter raised by the complainants and there is no evidence to indicate that the complainants were treated differently. The African Commission can therefore not find the respondent state to have violated the complainants' rights under article 3 of the African Charter.

Alleged violation of article 7

160. With respect to the alleged violation of article 7 of the African Charter, the complainants submit that the right to have their cause heard, in particular, the right to an appeal to competent national organs against acts violating their fundamental rights guaranteed under article 7(1)(a) of the African Charter have been violated. The respondent state on its part argues that their right to be heard has not been violated, noting that complainants' have disregarded the law.

161. The respondent state operates a legal system where the Constitution reigns supreme. Article 3 of the constitution of Zimbabwe provides that 'this constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void'. This means any law that violates the constitution, or any conduct that conflicts with it, can be challenged and struck down by the courts.

7 Communication 293/2004.
8 347 US 483 (1954).
9 www.legal-explanations.com.

162. The fundamental rights of Zimbabweans are enshrined in Chapter 3 of the constitution of Zimbabwe entitled the Declaration of Rights (Bill of Rights). All legislation passed by Parliament must conform to the Bill of Rights provisions of the constitution. If a legislative provision is inconsistent with the Bill of Rights, the courts, in particular, the Supreme Court, have been given the power to declare it to be void and of no force and effect.

163. This functions to determine constitutionality or compatibility or otherwise of laws with the constitution rests with the Supreme Court of the respondent state. Thus, when there are doubts about the constitutionality of a new legislation, persons affected are entitled to obtain a ruling from the Supreme Court as to whether or not the legislation is constitutional.

164. The Supreme Court has also been given extensive powers to provide appropriate remedies to persons whose fundamental rights have been violated. In terms of section 24(1) of the constitution, if any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, 'without prejudice to any other action with respect to the same matter which is lawfully available', that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.

165. In view of the importance attached to fundamental rights, article 24(4) provides that the Supreme Court shall have original jurisdiction

> to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and ... may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

166. In terms of the Constitution, there are at least two instances in which the Supreme Court can decline to entertain an application to determine the constitutionality of a law. The first is when in its view, the application is *vexatious* or *frivolous*; and the second is when the Supreme Court is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the constitution or under any other law. In the present communication, neither of the two grounds could apply. The Court did not find the application vexatious or frivolous and there was no other adequate means of redress of the issue as the Supreme Court in the respondent state has original and final jurisdiction with respect to matters dealing with fundamental rights.

167. Article 24 of the Constitution does not provide any time bar or an indication on when one should approach the Supreme Court to seek redress for any alleged violation of their rights. The constitution simply provides that anyone who believes his rights have been, are being or are likely to be violated can approach the court. This means that a law can be challenged at any time, depending on the circumstances, and on how the alleged victim perceive the law as interfering with the enjoyment of their rights, that is, whether the law has already violated the person's rights, whether the law is violating the person's rights or whether the law is likely to violate the person's rights.

168. In the case under consideration, the complainants argue that the law enacted by Parliament is likely to violate their rights guaranteed under the constitution of the respondent state and under international human rights instruments. For this reason, they approached the Supreme Court to declare those sections of the law they believed would *likely* violate their rights, unconstitutional. In the Supreme Court, the respondent state raised the point *in limine* that the applicant (complainants before the Commission), ought not to be heard on the merits as it had not sought registration. The Supreme Court upheld the respondent state's contention, and in its ruling advised the applicant to seek registration with the respondent state before approaching it (the Supreme Court) for the relief on the merits of the constitutional challenge.

169. Can it be said that the complainants were refused to be heard by the Supreme Court? In other words, by not hearing the complainants' petition on the merits, could it be argued that their right to have their cause heard has been violated?

170. To answer this question, the Commission will have to determine the meaning of having 'one's cause heard' under article 7(1)(a) of the Charter.

171. Article 7(1) of the African Charter provides that 'every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force'.

172. The right to have one's cause heard requires that the matter has been brought before a tribunal with the competent jurisdiction to hear the case. A tribunal which is competent in law to hear a case has been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law.

173. In the present communication, the complainants argue that the Supreme Court failed to hear their 'cause' on the merits. The Supreme Court instead pronounced itself on a preliminary objection

raised by the respondent state that the complainants were before the Court with dirty hands. In its ruling, the Supreme Court directed the complainants to go and do that which they were challenging (to register in accordance with the respondent state's law they were challenging before the court), and it is only then that their 'cause' could be heard on the merits.

174. In the opinion of the Commission, a 'cause' before a tribunal must be construed in broader terms to include everything related to the matter, including preliminary issues raised on the matter. The court need not pronounce itself on the merits of the substantive matter. It simply needs to hear the parties. Thus, by pronouncing on the preliminary issue raised by the respondent state on the question brought by the complainants, the Supreme Court in effect heard the 'cause' of the complainants. Besides, the Supreme Court did not close its doors on the complainants, it simply asked the latter to go and register and come back to it for the matter to be heard on the merits. It can therefore not be said that the respondent state has violated the complainants' rights under Article 7.

Alleged violation of article 9, 14 and 15

175. It is alleged that the state moved into action to seize the premises and close the offices of the complainants after the court's decision.

176. Can it be said that the state was enforcing a court decision or trying to prevent a breach of the law? The African Commission is of the view that even if the state was in the process of ensuring respect for the rule of law, it ought to have responded proportionally. In law, the principle of proportionality or proportional justice is used to describe the idea that the punishment of a certain crime should be in proportion to the severity of the crime itself. The principle of proportionality seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual and the interests of the society as a whole. In determining whether an action is *proportionate,* the Commission will have to answer the following questions:

- Was there sufficient reasons supporting the action?
- Was there a less restrictive alternative?
- Was the decision-making process procedurally fair?
- Were there any safeguards against abuse?
- Does the action destroy the very essence of the Charter rights in issue?

177. In its decision, on communication 242/2001, Interights and Others v Mauritania, the African Commission held in respect of the allegations made against the state that 'the dissolution of *UFD/Ere nouvelle* political party by the respondent state was not proportionate to the nature of the breaches and offences committed

by the political party and is therefore in violation of the provisions of article 10(1) of the African Charter'.

178. In the present communication, when put against the above criteria, it is clear that the action of the state to stop the complainants from publishing their newspapers, close their business premises and seize all their equipment cannot be supported by any genuine reasons. In a civilized and democratic society, respect for the rule of law is an obligation not only for the citizens but for the state and its agents as well. If the state considered the complainants to be operating illegally, the logical and legal approach would have been to seek a court order to stop them. The state did not do that but decided to use force and in the process infringed on the rights of the complainants.

179. The action of the respondent state to stop the complainants from publishing their newspapers, close their business premises and seize their equipment resulted in them and their employees not being able to express themselves through their regular medium; and to disseminate information. The confiscation of the complainants' equipment and depriving them of a source of income and livelihood is also a violation of their right to property guaranteed under Article 14. By closing their business premises and preventing the complainants' and their employees to work, the respondent state also violated Article 15 of the Charter. Thus, whether motivated by the Supreme Court's decision or through its own initiative, the action of the respondent state resulted to an infringement of the rights of the complainants. The Commission thus finds the state in violation of articles 9(2), 14 and 15 of the African Charter.

180. The African Commission thus finds the respondent state has not violated articles 3 and 7 of the African Charter as alleged by the complainants.

181. The African Commission however finds the respondent state in violation of articles 9(2), 14 and 15 of the African Charter.

182. Since a violation of any provision of the Charter necessarily connotes the state party's obligation under article 1, the African Commission also finds the respondent state in violation of article 1 of the African Charter. The African Commission thus recommends that the respondent state provides adequate compensation to the complainants for the loss they have incurred as a result of this violation.

Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe

(2009) AHRLR 268 (ACHPR 2009)

Communication 294/2004, *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa v Zimbabwe*

Decided at the 6th extra-ordinary session, April 2009, 26th Activity Report

Journalist deported for opinions expressed despite court order that he should be allowed to stay in the country

Admissibility (exhaustion of local remedies, exile, 50-57)
Expulsion (no reasons given for deportation, 92-95; due process, 114, 116)
Equal protection of the law (difference in treatment of non-nationals, 96-102)
Fair trial (right to be heard, 102, 105-108; presumption of innocence, 109; rule of law, duty of state to respect judgments, 118-120)
Expression (violation of freedom of expression as a result of deportation, 112)

Summary of facts

1. The communication is submitted by the Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development in Africa (the complainants) on behalf of Mr Andrew Barclay Meldrum (the victim). It alleges that Mr Meldrum's rights of freedom of expression and freedom to disseminate information were violated by the Republic of Zimbabwe (the respondent).

2. It is stated by the complainants that Mr Andrew Barclay Meldrum's an American citizen was legally admitted into Zimbabwe in October 1980 and settled permanently until 2003 when he was deported. It is alleged that the Ministry of Home Affairs of Zimbabwe on 10 February 1980 issued Mr Meldrum with a permanent residence permit which allowed him to work as a journalist and since then he has been a foreign correspondent for the *Mail and Guardian*, a paper published in the United Kingdom.

3. The complainants state that on 7 May 2002, Mr Meldrum published an article in the *Daily News* (an independent paper that has been closed by the respondent state) on the internet version of the *Mail and Guardian*. As a result of the publication, the complainants claim Mr Meldrum was charged with 'publishing falsehood' under section 80(1)(b) of the Access to Information and Protection of Privacy Act, (AIPPA). Mr Meldrum was found not guilty on 15 July 2002. The complainants state that on 7 May 2003, the Supreme Court of Zimbabwe declared section 80(1)(b) of the AIPPA unconstitutional in the case of *Lloyd Zvakavpano Mudiwa v The State*.

4. It is further alleged that immediately after his acquittal, Mr Meldrum was requested to report to the Immigrations Department Investigations Unit and was served with a deportation order issued in terms of section 14(i)g of the Immigrations Act. Mr Meldrum appealed the deportation order within 24 hours to the Ministry of Home Affairs as required by the Immigrations Act. Meanwhile, an application challenging the deportation order was filed by his lawyers in the High Court. On 17 July 2002, the High Court ordered that Mr Meldrum should be allowed to stay in the country until the Supreme Court had dealt with all the constitutional matters raised in the matter.

5. The complainants allege further that on 16 May 2003, Mr Meldrum was summoned to the Immigration Department where he was informed that he could no longer work as a journalist. He was informed that he had not been accredited in terms of the Access to Information and Protection of Privacy Act. Mr Meldrum informed the immigration authorities that he had filed an application to the Supreme Court and pending the outcome he should be allowed to practice journalism as provided by the Act. The immigration authorities then informed him that they had a deportation order issued by the Ministry of Home Affairs which empowered them to deport him forthwith without disclosing the reason for the deportation. Mr Meldrum was then forced into a car and taken to the airport.

6. They claim that an urgent appeal was filed in the High Court to interdict the deportation order and to compel the state to bring Mr Meldrum before the High Court by15:30hrs that same day. But at 15:30hrs, the state counsel appeared in court without Meldrum. The High Court gave another order prohibiting the state from deporting Mr Meldrum. At about 20:00hrs, the state counsel informed the court that Mr Meldrum could not be located. The High Court issued another order for the release of Mr Meldrum and this order was served on the immigration authorities by Mr Meldrum's lawyer who had to drive to the airport for that purpose. In spite of all these efforts and court orders, the state defiantly deported Mr Meldrum.

Complainant

7. The complainants allege that the respondent state has violated articles 2, 3, 7(1)(a), (b), 9, 12(4), and 26 of the African Charter on Human and Peoples' Rights.

Procedure

8. The complaint was received at the Secretariat of the African Commission on 6 October 2004.

9. On 12 October 2004, the Secretariat wrote to the complainants acknowledging receipt of the complaint and informing them that it will be considered at the Commission's 36th ordinary session.

10. On 13 December 2004, the Secretariat wrote a letter to inform parties that at its 36th ordinary session held from 23 November to 7 December 2004, in Dakar, Senegal, the African Commission considered the above mentioned communication and decided to be seized thereof.

11. On 3 February 2005, the complainants transmitted their arguments on admissibility.

12. On 22 February 2005, the Secretariat acknowledged receipt of the complainants' arguments on admissibility and inform them that the communication will be considered on admissibility at the 37th ordinary session of the African Commission scheduled to take place from 27 April to 11 May 2005 in Banjul, The Gambia.

13. The Secretariat of the African Commission wrote a *note verbale* to the respondent state transmitting complainants' submissions on admissibility and reminding the respondent state that the Secretariat is yet to receive their submission on admissibility.

14. A fax message was received by the Secretariat on 14 March 2005, from the respondent state requesting a postponement of consideration of the communication on admissibility to the 38th ordinary session.

15. The Secretariat acknowledged receipt of the above mentioned fax and forwarded the decision of the 36th ordinary session of the African Commission to the Ministry of Foreign Affairs by *note verbale* dated 13 December 2004 and urged the respondent state to submit on admissibility so that a decision could be taken at the next session of the African Commission.

16. In this respect, the Secretariat requested the respondent state if they could make their submissions on admissibility with respect of all pending communications by 18 April 2005. The Secretariat also asked the respondent state to inform it whether the government of Zimbabwe would like to make oral submissions, so that it can advise the complainants and the Members of the Commission accordingly.

17. During its 37th ordinary session, held from 27 April to 11 May 2005, in Banjul, The Gambia, the African Commission considered the said communication and deferred consideration thereof to its 38th ordinary session pending the respondent state's submissions of its arguments on admissibility.

18. On 24 May 2005, the Secretariat informed both parties about the Commission's decision. The Secretariat also reminded the respondent state that it had not submitted its submissions on admissibility requested it to do so before 15 October 2005 so that the Commission could decide on the admissibility at its forthcoming session

19. On 13 October 2005, the Secretariat reminded to the respondent state to submit its argument on admissibility, for consideration during the 38th ordinary session to be held from 21 November to 5 December 2005 in Banjul, The Gambia.

20. On 31 October 2005, the respondent state informed the Secretariat that the transmission of its submissions would be slightly delayed.

21. During the 38th ordinary session, the respondent state finally submitted its arguments on admissibility.

22. On 14 December 2005, the Secretariat wrote to both parties informing them that at its 38th ordinary session held from 21 November to 05 December 2005, in Banjul, The Gambia, the African Commission considered the communication and declared it admissible.

23. The Secretariat also informed both parties that the African Commission would consider the communication on the merits at its forthcoming session, and requested them to forward their arguments on the same.

24. On 4 April 2006, the Secretariat sent a reminder to both parties to submit their arguments on the merits.

25. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39th ordinary session held from 11 to 25 May 2006 in Banjul, The Gambia, the African Commission considered the communication and decided to defer its decision on the merits at its 40th ordinary session to be held from 15-29 November 2006 in Banjul, The Gambia.

26. On 3 November 2006, the Secretariat wrote a reminder to the respondent state to request its submissions on the merits of the case, as soon as possible.

27. On 26 November 2006, the Secretariat received the complainant's submissions on the merits and the Secretariat was

informed that the respondent state has been duly served a copy of the submission.

28. On 8 December 2006, the Secretariat informed both parties that at its 40th ordinary session held from 15 to 29 November 2006 in Banjul, The Gambia, the African Commission considered the communication and decided to defer its decision on the merits to its 41st ordinary session scheduled from 16 to 30 May 2007 in Ghana, in order to allow the respondent state to submit its arguments on the merits.

29. The Secretariat of the African Commission wrote a reminder to the respondent state to submit its arguments on the merits before 10 of May so that the Commission could take a decision at its 41st ordinary session.

30. At its 41st ordinary session held in Accra, Ghana from 16 to 30 May 2007, the African Commission considered the communication and decided to defer its decision on the merits to its 42nd ordinary session, in order to receive the respondent state's arguments.

31. The Secretariat wrote reminders on 25 June 2007 and 25 September 2007 to the respondent state to submit the requested arguments on merits latest by 15 October 2007 for consideration during the 42nd ordinary session held from 14 to 28 November 2007.

32. On 19 December 2007, the Secretariat wrote to inform both parties that at its 42nd ordinary session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the communication and decided to defer its decision on the merits to its 43rd ordinary session, in order to receive the respondent state's arguments.

33. On 19 March 2008, the Secretariat informed both parties about the decision and reminded the respondent state to submit its arguments on the merits in order to allow the Commission to take a decision on the matter.

34. At its 43rd ordinary session, the Commission considered the communication and decided to defer its decision on the merits to its 44th ordinary session.

35. At its 44th ordinary session held from 10-24 November 2008, in Abuja, Nigeria, the African Commission deferred consideration of the communication due to lack of time.

Decision on admissibility

The complainant's arguments

36. The complainant had argued the complaint had complied with article 56(3), because the information was based on court records and affidavits.

37. Regarding article 56(5), the complainants submit that the victim was not given the opportunity to exhaust the local remedies that were available to him, and that the High Court had ordered on many instances that he be allowed to stay in the country until a decision was made on the constitutional issues, which he had raised in an application pending before the Supreme Court. Complainants submit that in terms of section 24 of the Zimbabwe Constitution, any issues that pertain to the Zimbabwean Bill of Rights are referred to the Supreme Court, as the court of first instance on alleged case of human rights infringements. They argue that the deportation of the victim by the Immigration Department was in contempt of court orders, which had stayed his deportation.

38. That the victim could not have pursued any other remedies other than approach the courts for a vindication of his rights. They argue that the fact that he was given an opportunity on one occasion to appeal to the Minister of Home Affairs, who is responsible for immigration, does not at all prove the availability and effectiveness of local remedies, since the decision of the Minister 'is and was more of a review by a quasi judicial individual government official or functionary, who is not obliged to make considerations in accordance with legal rules which in all fairness takes away the very principles of natural justice and due process of the law (*sic*) which are covered under article 7 of the Charter'.

39. The complainants further argue that the Commission has ruled that only remedies of a judicial nature are considered to be effective remedies for acts of human rights violations. This, they rely on the Commission's decision in the *Constitutional Rights Project v Nigeria* where the commission ruled that:

> the Civil Disturbances Act empowers the Armed Forces Ruling Council to confirm the penalties of the Tribunal. This power is a discretionary, extraordinary remedy of a no judicial nature. The object of the remedy is to obtain a favour and not to vindicate a right. It would be improper to insist on the complaint seeking remedies from a source, which does not operate impartially and have no obligation to decide according to legal principles. The remedy is neither adequate nor effective.

40. The complainants added that in the *Constitutional Rights Projects* case (*supra*) the Commission stated further that the types of remedies that existed were of a nature that did not require exhaustion according to article 56(5).

41. It is also alleged that the victim was ordered to make representations to the Minister of Home Affairs on why he should not be deported after being served with his deportation order. The exhaustion of local remedies in this case would fall away as the Minister of Home Affairs being the person responsible for the Immigration Department, the state arm which was responsible for infringing on his rights, could not in any way proffer an effective remedy, the complainants assert.

42. The complainants submit that when the victim sought judicial protection of his rights, the Immigration Department deported him regardless of the court orders, which stayed his deportation, adding that the practice by the respondent state to disobey courts orders has made it senseless for an aggrieved party to seek or obtain any form of remedy.

43. The complainants therefore argue that 'one can safely conclude that the failure by the government of Zimbabwe to respect court orders thereby denying local remedies to victims of human rights violations amounts to constructive exhaustion of local remedies'.[1]

44. The complainants urged the Commission to draw inspiration from the Inter- American Court decision on the same principle, which states as follows; '... when remedies are denied for trivial reasons or without examination on merits, or if there is proof of the existence of a practice or policy tolerated by the government, the effect of which is to impede persons from invoking internal remedies that would normally be available to others, resort to such remedies becomes a senseless formality'.

Respondent state's arguments

45. The respondent state relies on two grounds:

(1) Disparaging language (article 56(3))

46. The respondent state submits that the language used in the communication is disparaging to the Republic of Zimbabwe, in particular, the Department of Immigration in Zimbabwe and, as such, the communication should be considered inadmissible. The respondent state claims that the language used to describe the deportation and events preceding the deportation of the complainant expose the state and the Department of Immigration of Zimbabwe to unnecessary ridicule. It argues that international attention garnered by the Land Reform Programme, is exacerbated by such disparaging statements, among other things, that there is no rule of law in Zimbabwe, court orders are not enforced and crimes against humanity are committed by high ranking state officials.

(2) Exhaustion of local remedies (article 56(5))

47. Concerning article 56(5), the respondent state submits that the complainants have not attempted to exhaust local remedies and, as such, the communication should be considered inadmissible.

[1] As was established in the cases of *Godinez Cruz v Honduras* (Inter-American Court on Human Rights, Series C No 5 at 69, *Ouko v Kenya* [(2000) AHRLR 135 (ACHPR 2000)] (communication 232/99) and *Rencontre africaine pour la defense des droits de l'homme v Zambia* [(2000) AHRLR 321 (ACHPR 1996)] (communication 71/92).

According to the respondent state, the victim, while still resident in the Republic of Zimbabwe, approached the local courts on a number of occasions seeking redress. The state argues that the victim does not, however, need to be physically in Zimbabwe in order to avail himself of available domestic remedies. That he can instruct his lawyers from wherever he is and the relevant action can be done through his lawyers. The state argues further that his lawyers could, for instance, make issue of the alleged contempt of court by immigration officials, and also push for the revocation of the deportation order and subsequent reinstatement of the victim's residence permit.

48. Consequently, the respondent state argues that the communication does not meet the requirements of article 56(3) and 56(5) and should be declared inadmissible.

49. During its oral submission, the respondent state submitted that following discussions with the complainants, it decided to abandon its argument of disparaging language, but maintains the issue of non exhaustion of local remedies.

Decision

50. When the parties made oral submissions before the Commission, the respondent state submitted that, it had decided to abandon the argument on disparaging language but maintained the grounds on issue of non exhaustion of local remedies. The Commission takes note of that submission, and would not make a ruling on Article 56(3) since the parties are not at issue on the question of disparaging language.

51. Both parties made submissions on article 56(5) regarding the question of none exhaustion of local remedies. The Commission has stated in previous decisions, (see paragraph 39 above) that the principle of exhaustion of domestic remedies, presupposes existence of effective judicial remedies. Administrative or quasi judicial remedies which do not operate impartially are considered as inadequate and ineffective. The respondent state argues that the victim did not exhaust domestic remedies. It argues that, the mere fact that the victim was outside the country could not stop the victim instructing lawyers to approach the courts on his behalf ie the victim did not require or need to be inside the country to access the domestic remedy. The respondent state submitted further that the victim could have initiated contempt proceedings.

52. The complainants submitted at length on the non applicability of article 56(5) and argued in favour of invoking the principle of constructive exhaustion of local remedies. In summary, they submit that the disregard by the respondent state of various court orders prior to, and coupled with, the deportation of the victim, denied him

the opportunity to exhaust local remedies. Secondly they submit that there were no domestic remedies to exhaust, since the judicial remedies had proved ineffective. The appeal to the minister was a non judicial remedy, for purposes of addressing human rights violation. Such a remedy does not fall within the scope of article 56(5), it failed to comply with rules of natural justice. In any case it was the minister who had ordered the deportation, thus he could not be expected to proffer any remedy to the victim.

53. The Commission agrees with the complainants' arguments. The Commission is of the firm view that immigration officials of the respondent state had no basis in law to disregard court orders. The complainants referred the Commission to the *Cordinez Cruz* decision, on constructive exhaustion of local remedies. The Commission has looked at the decision in terms of article 60 of the Charter and finds it very persuasive. The Commission has previously applied this principle too, where the complainant or victim is impeded from exhaustion of domestic remedies through the conduct of the respondent state.

54. The deportation of the victim in the case under consideration had been effected in the face of several High Court orders, the Commission finds that to require the victim to pursue further judicial remedies, when all efforts at seeking judicial remedies had been frustrated and ignored by the respondent state, would have amounted to a 'senseless formality' in the true meaning of the words. The remedy which would have granted protection to Mr Meldrum, namely the application pending in the Supreme Court, was considered by the respondent state's immigration officials, as 'trivial' and of no legal consequence. The respondent state had notice of the pending application in the Supreme Court, and yet effected the deportation. It actively participated in impeding the victim from accessing the remedy.

55. The Commission therefore holds that the conduct of the respondent state brings this communication within the scope of constructive exhaustion of remedies principle. By accepting the applicability of the principle of constructive exhaustion of domestic remedies in this case, the Commission distinguishes this case from its decision in communication 219/98 *Legal Defence Centre v The Gambia*[2] in which it declared the communication inadmissible for

[2] In communication 219/98 *Legal Defence Centre v The Gambia* [(2000) AHRLR 121 (ACHPR 2000)], the victim, one Mr Sule Musa was deported by the Gambian authorities to Nigeria. The Commission sought clarification during its 25th ordinary session, whether the complainant could have recourse to domestic remedies, to which no response was received. The Commission declared the communication inadmissible, observing that; 'the victim does not have to be physically present in a country to avail himself of available domestic remedies, such could be done by

failure by a deportee to exhaust local remedies, since the circumstances were not similar.

56. The decision in the *Legal Defence Centre* is distinguishable because in that case, no effort was made to exhaust domestic remedies. In the case under consideration, the respondent state was actively engaged in frustrating the restraint orders obtained from the domestic court. The Commission is aware that its decisions on admissibility must be based on the criteria under article 56, it must however reiterate that states parties are obliged to respect their obligation to guarantee the independence of the judiciary under article 26 of the Charter. It is the view of the Commission that article 56(5) must be read in the context of the article 26 of the Charter. A state which ignores its duty to guarantee an independent judiciary fails to provide effective remedies to human rights violations, and thereby undermines the protection of human rights under the Charter.

57. On these grounds, the African Commission declares the communication admissible.

Decision on the merits

Complainant's submissions

58. The complainants allege the violations of articles 2, 3(1) and (2), 7(a), 9, 12(4) and 26 of the African Charter.

59. Concerning alleged violations of articles 2 and 3 of the Charter, the complainants submitted that the deportation of Mr Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit.

60. The complainants state that the allegations against Mr Meldrum were never proven in the domestic courts, but the respondent state proceeded to deport him despite numerous High Court orders that he should not be deported, until the constitutional application for stay of deportation had been heard.

61. The complainants allege that the act of deportation constituted an unfettered exercise of discretion by the Chief Immigration Officer, which was tantamount to indiscriminate action by state authorities and violated the right to equality before the law, therefore it is a violation of article 2 of the Charter.

his counsel ... Rather than approach the Commission first, the complainant ought to have exhausted available local remedies in the Gambia ...' (emphasis added). It must be stated here that the distinguishing factor relied by the Commission in the Zimbabwe case is the role played by the state in impeding access to the local remedies available.

62. The complainants conclude that the deportation of Mr Meldrum was not in anyway motivated by the desire to promote peace and security, neither was it to accomplish a given pressing social need, it was to physically censor him from disseminating information within Zimbabwe.

63. The complainants recall the jurisprudence of the Commission dealing with cases of expulsion of non-nationals from state parties to the Charter, in which concluded that deporting non-nationals without providing them the opportunity to challenge their deportation before the courts, constitute discrimination and inequality before the law. Article 2 of the Charter obligates state parties to ensure that persons living in their territory, be they nationals or non nationals, enjoy the rights guaranteed in the Charter.[3]

64. The complainants argued that Mr Andrew Meldrum was arrested and charged under the Access to information and Protection of Privacy Act (AIPPA), but the charges against him were subsequently dismissed in court, and the state never appealed. Further, the sections of the Act which were deemed to have breached were subsequently struck off and declared unconstitutional.

65. The complainants submit that, in essence, the deportation of Mr Andrew Meldrum is unfounded at law.

66. Concerning article 7(1)(a) and (b), the complainants note that the failure by the respondent state to obey court judgments or orders constitutes a violation of the Charter and breaches the duty and right to have independent and competent tribunals and courts mandated with the protection of rights as provided in the Charter.

67. The complainants submit further that the deportation order was a violation of the presumption of innocence which is a doctrine well founded under the principles of natural justice as it gives an accused person the opportunity to have his cause heard by an organ competent to determine such guilt or innocence.

68. They argue that, when an individual, who has a vested interest in the matter, acts contrary to principles of natural justice, and becomes the first and last institution of appeal, then decisions of such an individual would be a violation of the Charter, in particular article 7(1)(a) and (b).

69. The complainants emphasise that the Access to Information and Protection of Privacy Act allows journalists to practice for six months whilst their accreditation applications were pending, and Mr Meldrum was still within the transitional reprieve period and was, in terms of the Act, allowed to work as a journalist while his application was pending.

3 *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997) at para18.

70. The complainants note further that the free practice of the profession of journalism and freedom of expression ought to be interpreted to include freedom to impart and receive information, and this was abrogated by the respondent state.

71. It is alleged by the complainants that Mr Meldrum had been charged [with] publication of falsehoods, charges he was acquitted of in the Magistrate's Court, against which the state never appealed. They state further that the same provision of AIPPA under which Mr Meldrum [was] charged, was declared unconstitutional by the Supreme Court.[4] The complainants submit that the only way for the respondent state to deter Mr Meldrum from the free practice of his profession was to physically censor him through an arbitrary act of deportation.

72. The complainants consider that the response of the state to perceive, real or illicit threats to national security, public order was disproportionate to the threat, if any, posed by the writings of Mr Meldrum.

73. Referring to article 12(4), the complainants affirm that non-nationals admitted in any state party to the Charter should enjoy the same rights entitled to nationals. Thus, according to the complainants, the expulsion of Mr Meldrum did not satisfy the provisions of the Charter as it was arbitrary in so far as it was improper, disproportionate and contrary to the law and the principles of natural justice.

74. Recalling the restriction on fundamental rights guaranteed by the Charter, the complainants affirm that the limitations are founded where the drafters of the Charter include clawback provisions such as 'in accordance with the law', 'abides by the law', 'within the law' and more clearly stated under article 27(2).

75. Relying on the principles of necessity and proportionality and referring to international jurisprudence, the complainants submit that the act of restriction of a right must not be arbitrary, unfair or based on irrational considerations, but must be rationally connected to the objective, and should not impair the right or freedom in question more than is necessary to accomplish a given objective or a pressing social need.

76. Further, the complainants argue that several international human rights instruments to which Zimbabwe is a party recognise the importance of non-discrimination in the pursuit and enjoyment of human rights by nationals and non-nationals. The complainants also submit that the deportation of Mr Meldrum was in violation of article 26, read together with article 7 of the Charter. According to the complainants, article 7 as has been ruled by the Commission gives

4 See para 3 (*supra*).

meaning to the individual right, whilst article 26 emphasises on the importance of institutions which give effect to the right in article 7.

77. The complainants argue that Mr Meldrum was deported while his case was yet to be heard by the Supreme Court sitting as a constitutional court, thus rendering the right to appeal in this instance illusory. The complainants submit that the respondent state, through various organs had defied court orders and allowed such actions to become 'acceptable standard of deviation' from enforcing rights guaranteed in the Charter.

78. The complainants submit that article 26 of the Charter was violated by pointing to the wanton disregard of court orders by the respondent state and non-state entities as clear evidence of the non-existence of the rule of law, principles of natural justice, and presumption of innocence. For the complainants, these latest principles are elementary indicators of the existence of a proper functioning judiciary, an executive which operates within the law, and a legislature which appreciates the essence of separation of powers.

79. The complainants argued that the actions of the respondent state were a violation of Article 9(1) and (2) of the Charter, which provides for freedom of expression, and the right to receive and impart information. They claim that the deportation of Mr Meldrum deprived him of his rights, as well as denying the general citizenry their rights to receive information.

80. The complainants recall that the restrictions on freedom of expression under international law have been examined under various tests of necessity, proportionality and achievement of a legitimate objective, and request the Commission to apply the same tests to the present communication.

Respondent state's submission

81. The respondent state did not formally submit its arguments on the merits in spite of several reminders. However, it should be noted that in its submission on admissibility dated 16 November 2005, the respondent state also made arguments relating to the merits of the communication. The African Commission here below summarises those arguments and considers them as the state's submissions on the merits of the present communication.

82. In relation to the alleged violation of article 2, the respondent state denies that the victim's right to equality before the law was violated. The state submits that the complainant faced deportation because of alleged violations of the terms of his Residence Permit which entitled him to stay in Zimbabwe. According to the state, it is wrong to suggest that Mr Meldrum's right to equality before the law was violated because of his opinion and/or origin.

83. Concerning article 3, the respondent state submits that the victim was afforded protection of the law, adding that it is on record that the victim approached local courts in Zimbabwe at least four times prior to his deportation and that the matters were given due consideration.

84. With regards to the alleged violation of article 7, the respondent state submits that the victim was not denied his right to appeal. The state argues that he made an application to the High Court which, in turn, was referred to the Supreme Court, noting that the issues were still pending before the Supreme Court at the time the victim left for the United Kingdom. The respondent state argues that the complainant was at liberty to approach the courts, whenever he deemed it necessary to do so.

85. Concerning article 9, the respondent state submits that while the right to freedom of expression is enshrined in the Constitution of Zimbabwe and contained in article 9 of the African Charter, it would be inappropriate for the victim to seek to enforce that right by way of publishing falsehoods. Moreover, the state avers, publications of falsehoods are in direct contravention of the Access to Information and Protection of Privacy Act (AIPPA).

86. On the alleged violation of article 12(4), the respondent state submits that Immigration Officials responsible for Mr Meldrum's deportation were guided by section 14(1)(g) of the Immigration Act. Under this law, the state argues, Mr Meldrum was declared a prohibited immigrant and the Chief Immigration Officer revoked his Residence Permit in terms of section 20(2) of Statutory Instrument 195 of 1998. The decision to deport Mr Meldrum, according to the respondent state, cannot therefore be considered as outside of the provisions of the law as it was made by the Chief Immigration Officer who was acting within the purview of the law governing the deportation of non-nationals, namely the Immigration Act.

87. Concerning article 26, the respondent offers no argument in response to allegations made by the complainant.

Decision of the Commission on the merits

Alleged violation of articles 2 and 3

88. The Commission has considered the submissions of both parties regarding the alleged violations of the African Charter.

89. With respect to the alleged violation of article 2 of the African Charter, the complainants argue that the deportation of Mr Meldrum was based on vague and unsubstantiated reasons of a danger to public order, national security and breach of his work permit, adding that the deportation process gives unfettered discretion to the Chief Immigration Officer, and this is tantamount to indiscriminate

practices by state authorities and erodes the right to equality before the law, therefore it is a violation of article 2 of the Charter. The complainants also argue that article 2 guarantees against discrimination based on national origin.

90. Article 2 of the African Charter provides that:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Article 3(2) provides that 'every individual shall be entitled to equal protection of the law'.

91. Discrimination can be defined as any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms.[5] Article 2 of the African Charter stipulates the principle of non discrimination, which is essential to the spirit of the African Charter.[6]

92. The respondent state argued that Mr Meldrum was deported because he violated the terms of his residence permit and therefore submit that article 2 was not violated. The facts as presented by the complainants indicate that the victim, Mr Meldrum, was legally resident in the respondent state, his residential permit had not expired, and he had not been refused accreditation by the MIC. His application contesting the denial of accreditation under AIPPA was still pending before the Supreme Court. The High Court had ordered that he remain in the country until his application in the Supreme Court is disposed of. It had issued a restraining order against his deportation. In short, he was on all-fours legally resident in the respondent state.

93. The respondent state did not give any details concerning the terms of the residence permit which Mr Meldrum violated. The Commission is not satisfied by the reasons or explanations given by the respondent state. It is not very clear why he was deported. Given the circumstances, it can only be concluded that he was deported because he was a non-national who had published what the respondent state considered to be falsehoods, which are not protected by the Constitution. In its decision in the case between *Institute for Human Rights and Development in Africa v Republic of Angola*,[7] the African Commission held that

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5 See The [UN] Human Rights Committee, General Comment No 18.

6 See Communication 241/2001 — *Purohit and Moore v The Gambia* [(2003) AHRLR 96 (ACHPR 2003)] para 49.

7 Communication 292/2004 [(2008) AHRLR (ACHPR 2008)].

> although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and … although the African Charter does not bar deportations per se, the African Commission reaffirms its position that a state's right to expel individuals is not absolute and it is subject to certain restraints, one of those restraints being a bar against discrimination based on national origin.

94. It would be interesting to know what the government would have done if Mr Meldrum was a Zimbabwean. Surely, the respondent state would not have deported its own national to another country. The only logical reason the state deported him under then prevailing circumstances was because he was a non-national. In the opinion of the Commission therefore, it appears that the victim was targeted because he is not a national of the respondent state, and this according to the Commission constitutes a violation of article 2 of the Charter.

95. With respect to article 3 of the Charter, the complainants submit that the deportation of Mr Meldrum in defiance of the court orders amounted to a violation of article 3 of the African Charter. Article 3 guarantees fair and just treatment of individuals within the legal system of a given country, whereby every individual is equal before the law and guaranteed equal protection of the law. Given the treatment Mr Meldrum was exposed to, would it be argued as the respondent state does, that he was able to access the courts and therefore was given equal protection of the law?

96. The most fundamental meaning of equality before the law under article 3(1) of the Charter is the right by all to equal treatment under similar conditions. The right to equality before the law means that individuals legally within the jurisdiction of a state should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. Its meaning is the right to have the same procedures and principles applied under the same conditions. The principle that all persons are equal before the law means that existing laws must be applied in the same manner to those subject to them. The right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement. It means that judges and administration officials may not act arbitrarily in enforcing laws.

97. Factual patterns that are objectively equal must be treated equally. Thus, it is expected that if the law requires that all those who publish offensive articles against the government be brought before a judge for questioning, and if found guilty, sentenced or pay a fine, this law should apply to all those subjected to it, including nationals and non-nationals alike.

98. In the present communication, that does not seem to be the case, because the victim is a non-national, the respondent state chose not to treat him as it would have treated nationals. It is very

unlikely and impractical that if a Zimbabwean had published the same article the victim published, he/she would have been treated the same way. In the opinion of the Commission therefore, the respondent state violated article 3(1) of the Charter.

99. Equal protection of the law under article 3(2) on the other hand, means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness.[8] It simply means that similarly situated persons must receive similar treatment under the law.[9]

100. In its decision in *Zimbabwe Lawyers for Human Rights and Another v Republic of Zimbabwe*,[10] this Commission relied on the Supreme Court decision in *Brown v Board of Education of Topeka*,[11] in which Chief Justice Earl Warren of the United State of America argued that

> equal protection of the law refers to the right of all persons to have the same access to the law and courts and to be treated equally by the law and courts, both in procedures and in the substance of the law. It is akin to the right to due process of law, but in particular applies to equal treatment as an element of fundamental fairness.[12]

101. In order for a party therefore to establish a successful claim under article 3(2) of the Charter, it should show that the respondent state had not given the complainant the same treatment it accorded to the others. Or that the respondent state had accorded favourable treatment to others in the same position as the complainant.

102. In the present communication, the Commission notes that the respondent state treated the victim in a manner which denied him the opportunity to seek protection of the courts. Due process which was key to ensuring remedy to the deportation, and therefore the protection of the rights of the victim were denied through the arbitrary actions of the respondent state. The African Commission therefore finds that the respondent state violated article 3(2) of the African Charter.

Alleged violation of article 7(1)(a) and (b)

103. The complainants argue that the deportation of Mr Meldrum violated article 7(1)(a) and (b). Article 7(1) of the Charter provides that:

> Every individual shall have the right to have his cause heard. This comprises (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognised and

8 See *People v Jacobs*, 27 California Appeal, 3d 246, 103 California Rep 536, 543, 14th Amendment, US Constitution.
9 See *Dorsey v Solomon*, DCMd., 435 F. Supp. 725.
10 Communication 293/2004.
11 347 US 483 (1954).
12 www.legal-explanations.com.

guaranteed by conventions, laws, regulations and customs in force; (b) The right to be presumed innocent until proved guilty by a competent court or tribunal.

104. Article 7(1) deals with the right to have one's cause heard, which comprises, *inter alia* (a) the right to appeal to competent national organs against acts violating their rights, and (b) the right to be presumed innocent until proven guilty by a competent court or tribunal.

105. In the present communication, the victim went to the courts of the respondent state. The courts ruled in his favour against the deportation order. The victim petition the Supreme Court for enforcement of his right to practice his profession after his accreditation was rejected, but before the latter could hear the application, the respondent state deported him. Could it be said that the victim's right to have his cause heard was violated by the respondent state?

106. The right to have one's cause heard requires that the victims have unfettered access to competent jurisdiction to hear their case. A tribunal which is competent in law to hear a case must have been given that power by law: it has jurisdiction over the subject matter and the person, and the trial is being conducted within any applicable time limit prescribed by law. Where the competent authorities put obstacles on the way which prevents victims from accessing the competent tribunals, they would be held liable. These are the issues which must be borne out [*sic*] by the evidence to warrant the Commission's findings of a violation.

107. In the present communication, it is clear that the respondent state did not want the victim to be heard in the Supreme Court. To ensure that this happened, the respondent state deported him out of the country before the date scheduled for the hearing, thus effectively preventing him from being heard. Admittedly, the victim could still have proceeded against the respondent state from wherever he was deported to, but by suddenly deporting him the respondent state frustrated the judicial process that had been initiated.

108. To this extent, the respondent state is found to have violated article 7(1)(a) of the African Charter.

109. Regarding the allegations concerning the violation of article 7(1)(b), the Commission finds that the deportation was effected in disregard of several High Court orders. The Immigration officers refused, or failed to produce Mr Meldrum as was ordered by the court. By doing so they denied him the right to be heard by a competent and impartial tribunal. Instead they acted under the Immigration Act without affording him an opportunity to defend himself. The actions of the respondent state amounted to a conclusion that Mr Meldrum was guilty of the allegations against him, contrary to the presumption

of innocence. The Commission finds that the conduct of the respondent state amounted to a violation of article 7(1)(b) as alleged by the complainants.

Alleged violation of article 9

110. With respect to allegations of violation of article 9 of the African Charter, guaranteeing freedoms of expression, the complainants submit that the deportation of Mr Meldrum deprived him of his rights to receive information, and disseminate his opinions, as well as the right of the general citizenry to receive information.

111. Article 9(1) of the African Charter provides that every individual shall have the right to receive information. Article 9(2) states that '[e]very individual shall have the right to express and disseminate his opinions within the law'. Does the deportation of the victim violate his right to freedom of expression?

112. It should be recalled that the victim's deportation arose from the publication of an article that the respondent state did not appreciate. The respondent state resorted to deportation in order to silence him, in spite of]a court order that he could stay in the country. Admittedly, he is not prevented from expressing himself wherever he was deported to, but vis-à-vis his status in the respondent state, which is a state party to the African Charter, his ability to express himself as guaranteed under article 9 was violated.

Alleged violation of article 12(4)

113. In the same vein, the deportation of the victim by the respondent state amounts to a violation of article 12(4) of the African Charter, which provides that 'a non-national legally admitted in a territory of a state party to the present Charter, may only be expelled from it by virtue of a decision taken in accordance with the law'.

114. The African Commission notes that the import of this provision under the African Charter is to ensure that due process is followed before legally admitted non-nationalsare expelled from a member state. In the *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme and Others v Angola* case,[13] the African Commission stated that although African states may expel non-nationals from their territories, the measures that they take in such circumstances should not be taken at the detriment of the enjoyment of human rights, and that while the Charter does not bar a state's right to deport non-nationals *per se*, it does require deportations to take place in a manner consistent with the due process of law.[14]

[13] Communication 159/1996.
[14] Para 23.

115. The African Charter's requirement of due process as outlined above is also shared by similar systems elsewhere. The Human Rights Committee under the International Covenant on Civil and Political Rights, for instance, had expressed a similar concern over the treatment of aliens being deported from Switzerland when it held the latter liable for degrading treatment and use of excessive force resulting on some occasions in the death of the deportee during deportation of aliens.[15] The Committee recommended that Switzerland should 'ensure that all cases of forcible deportation are carried out in a manner which is compatible with articles 6 and 7 of the Covenant' and that 'restraint methods do not affect the life and physical integrity of the persons concerned'.[16]

116. Very clearly, the situation as presented by the respondent state did not afford the victim due process of law for protection of his rights. The respondent state ignored the court orders that he be allowed to stay in the country. The African Commission thus holds the respondent state in violation of the provisions of article 12(4) of the African Charter.

Alleged violation of article 26

117. With respect to the alleged violation of article 26, the complainants argue that by refusing to comply with court decisions, the respondent state not only violated article 7, but also violated article 26. Article 26 of the Charter provides that state parties shall have the duty 'to guarantee the independence of the courts'. The complainants argue further that the deportation is in violation of article 7(a) and (b) as read together with article 26 of the Charter, noting that article 7 gives meaning to the individual right, whilst article 26 emphasises on the importance of ensuring the independence and integrity of the institutions which give effect to the right in article 7.

118. It is impossible to ensure the rule of law, upon which human rights depend, without guaranteeing that courts and tribunals resolve disputes both of a criminal and civil character free of any form of pressure or interference. The alternative to the rule of law is the rule of power, which is typically arbitrary, self-interested and subject to influences which may have nothing to do with the applicable law or the factual merits of the dispute. Without the rule of law and the assurance that comes from an independent judiciary, it is obvious that equality before the law will not exist.[17]

15 UN Human Rights Committee, ICCPR, A/57/40 vol I (2002) at para 76(13).

16 As above.

17 See the views expressed by K Ryan, in 'Judges, courts and tribunals', paper presented at the Australian Judicial Conference Symposium on Judicial Independence and the Rule of Law at the Turn of the Century, Australian National University, Canberra, 2 November 1996.

119. It is a vital requirement in a state governed by law that court decisions be respected by the state, as well as individuals. The courts need the trust of the people in order to maintain their authority and legitimacy. The credibility of the courts must not be weakened by the perception that courts can be influenced by any external pressure.

120. Thus, by refusing to comply with the High Court orders, staying the deportation of Mr Meldrum and requiring the respondent state to produce him before the court, the respondent state undermined the independence of the courts. This was a violation of article 26 of the African Charter.

121. In view of the above reasoning, the African Commission: holds that the respondent state, the Republic of Zimbabwe, has violated articles 1, 2, 3, 7(1) (a) and (b), 9, 12(4) and 26 of the African Charter. The African Commission recommends that the respondent state should:

(a) Take urgent steps to ensure court decisions are respected and implemented;

(b) Rescind the deportation orders against Mr Andrew Meldrum, so that he can return to Zimbabwe, if he so wishes, being a person who had permanent residence status prior to his deportation. The status quo ante to be restored;

(c) Ensure that the Supreme Court finalises the determination of the application by Mr Meldrum, on the denial of accreditation;

(d) In the alternative, taking into account that the AIPPA has undergone considerable amendments, grant accreditation to Mr Andrew Meldrum, so that he can resume his right to practice journalism; and

(e) Report to the African Commission within six months on the implementation of these recommendations.

Scanlen and Holderness v Zimbabwe

(2009) AHRLR 289 (ACHPR 2009)

Communication 297/2005, *Scanlen & Holderness v Zimbabwe*

Decided at the 6th extraordinary session, April 2009, 27th Activity Report

Compulsory accreditation of journalists

Admissibility (exhaustion of local remedies, unavailable, 39)
Expression (mandatory accreditation of journalists, 89, 90, 92, 97, 98, 101, 102, 117; self-regulation, 90, 91, 125; false news, 117, 120)
Interpretation (international standards, 93-97)
Limitations of rights (107; public order, 109-111; within the law, 112-115)

Summary of the facts

1. The complainants are the Independent Journalists Association of Zimbabwe, the Zimbabwe Lawyers for Human Rights and the Media Institute of Southern Africa. The respondent state is the Republic of Zimbabwe, a state party to the African Charter on Human and Peoples' Rights (the African Charter).

2. The complainants submit that on 18 March 2002, the respondent state enacted a legislation known as the Access to Information and Protection of Privacy Act (AIPPA), Chapter 10:27. Section 79 subsection 1 of the Act provides that: 'No journalist shall exercise the rights provided in section 78[1] in Zimbabwe without being accredited by the Commission'. The Commission being referred to

[1] Section 78 provides that 'Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as 'journalistic privilege'),
(i) to enquire gather, receive and disseminate information;
(ii) to visit public bodies with the express purpose of carrying out duties as a journalist;
(iii) to get access to documents and materials as prescribed in this Act;
(iv) to make recordings with the use of audio-video equipment, photography and cine-photography;
(v) to refuse to prepare under his signature reports and materials inconsistent with his convictions;
(vi) to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation.'

here is the Media and Information Commission (MIC) established under AIPPA, the Zimbabwe legislation, subject of this communication.

3. According to the complainants, the Media and Information Commission (MIC) is managed by a board appointed by the Minister of Information and Publicity, or other ministers the president assign the administration of the AIPPA. Complainants allege that the Minister acts in consultation and in accordance with directions from the president of the Republic of Zimbabwe.

4. It is also alleged that no journalist may practice journalism unless he/she is accredited by the MIC and that section 80 of the AIPPA provides that a journalist found guilty of abusing his or her journalistic privilege is liable to a fine or imprisonment for a period not exceeding two years.

5. It is further submitted by the complainants that sections 79(1) and 80(1)(b) of the AIPPA contravene article 9 of the African Charter on Human and Peoples' Rights which provides that: '[e]very individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law.'

6. According to the complainants, compulsory accreditation of journalist, irrespective of the quality of the accrediting agency, interferes with freedom of expression. They state that accreditation fees provided for under the law are an additional restriction on freedom of expression. They allege that compulsory accreditation of journalists by a commission which lacks independence interferes with professional independence and the autonomy of the journalism profession. The complainants submit further that, the MIC is not democratically constituted. Its constitution and control is not consistent with democratic values.

7. The complainants submit further that self-regulation is a central feature of an independent profession and that the AIPPA is inherently inimical to freedom of expression and has no justification in a democratic society.

8. The complainants claim further that they have a real and substantive interest in the matter as they were established to protect human rights and the freedom of expression.

9. They submit finally that they have exhausted local remedies and that they have litigated the issues in the highest court in Zimbabwe, whereby the Supreme Court of Zimbabwe declined to declare unconstitutional, the intentional publication of falsehoods and compulsory accreditation of journalists.

Complaint

10. The complainants allege that section 79(1) and section 80 of the Access to Information and Protection of Privacy Act of Zimbabwe contravene article 9 of the African Charter on Human and Peoples' Rights.

Procedure

11. The Secretariat of the African Commission on Human and Peoples' Rights acknowledged receipt of the communication on 10 February 2005 and informed the complainants that the communication was registered as communication 297/2005 — Scanlen & Holderness (on behalf of Independent Journalists Association of Zimbabwe Lawyers for Human Rights and Media Institute of Southern Africa)/Zimbabwe.

12. The Secretariat also informed the complainants that the communication would be considered for seizure at the 37th ordinary session of the Commission scheduled to take place from 27 April to 11 May 2005, in Banjul, The Gambia.

13. On 2 June 2005, the Secretariat informed both parties that during its 37th ordinary session the African Commission considered the communication and decided to be seized thereof. The Secretariat also informed them that the Commission intended to consider the communication on admissibility at its 38th ordinary session to be held from 21 November to 5 December 2005. It requested the parties to forward their arguments on admissibility within three (3) months from the date of the notification.

14. On 18 August 2005, the Secretariat sent reminders to both parties requesting them to submit their arguments on admissibility.

15. On 12 September 2005, the Secretariat received the complainants' arguments on admissibility.

16. On 14 December 2005, the Secretariat wrote to both parties informing them that during its 38th ordinary session held from 21 November to 5 December 2005, in Banjul, The Gambia, the African Commission considered the communication and declared it admissible.

17. The Secretariat also informed both parties that the African Commission intended to consider the communication on the merits at its forthcoming session, and invited the parties to forward their arguments on the same.

18. On 6 March 2006, the Secretariat received and acknowledged receipt of the complainants' submissions on the merits.

19. On 4 April 2006, the Secretariat wrote a reminder to the respondent state to submit their arguments on the merits.

20. During the 39th ordinary session held from 11 to 25 May 2006, in Banjul, The Gambia, the respondent state submitted its arguments on the merits.

21. On 26 July 2006, the Secretariat wrote to both parties informing them that, at its 39th ordinary session held from 11 to 25 May 2006, in Banjul, The Gambia, the African Commission considered the above communication and decided to defer its decision on the merits to its 40th ordinary session to be held from 15 to 29 November 2006 in Banjul, The Gambia.

22. On 8 December 2006, the Secretariat informed both parties that at its 40th ordinary session, the African Commission considered the communication and decided to defer its decision on the merits to its 41th ordinary session scheduled from 16 to 30 May 2007 in Ghana.

23. On 25 June 2007, the Secretariat wrote to both parties informing them that at its 41st ordinary session the Commission considered the communication and deferred its decision on the merits to its 42nd ordinary session, in order to finalise the draft decision.

24. On 19 December 2007, the Secretariat wrote to both parties informing them that at its 42nd ordinary session held from 15 to 28 November 2007 in Brazzaville, Congo, the African Commission considered the communication and deferred its decisions on the merits to its 43rd ordinary session.

25. At its 43rd ordinary session held in Ezulwini, Kingdom of Swaziland from 7 – 22 May 2008, the African Commission deferred consideration of the communication to its 44th ordinary session.

26. By *note verbale* of 2 July 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

27. At its 44th ordinary session held in Abuja, Federal Republic of Nigeria from 10 to 24 November 2008, the African Commission deferred consideration of the communication.

28. By *note verbale* of 5 December 2008 and letter of the same date, the Secretariat informed both parties of the Commission's decision.

Law

Admissibility

The state's submission

29. The respondent state submits that the communication does not meet the requirements of admissibility under the African Charter on Human and Peoples' Rights because:

(i) the complainants fail to disclose a violation of article 9 of the Charter and;

(ii) the complainants have not exhausted local remedies as required under article 56(5).

Non exhaustion of local remedies

30. The respondent state claims that the complainants have not approached the Supreme Court of Zimbabwe to seek redress in terms of section 24(1) of the Constitution of Zimbabwe and, as such, the communication should be considered inadmissible.

31. Section 24(1) affords every person the opportunity to obtain expeditious redress if any of the rights under the Declaration of Rights in the Constitution of Zimbabwe are infringed. The Supreme Court has a wide discretion to grant any form of redress in order to enforce the Declaration of Rights.

32. The respondent state made reference to a decision of the Supreme Court in the *Association of Independent Journalists* case, whereby the Supreme Court struck down sections 80(1)(a), (b) and (c) as unconstitutional and the sections were subsequently repealed and substituted through section 18 of Act 5 of 2003.

33. The respondent state submits further that the complainants have not challenged the constitutionality of the substituted provision before the courts in Zimbabwe, arguing that complainants are therefore requesting the African Commission to become a tribunal of first instance, a function which it cannot fulfil, either as a legal or practical matter.

Complainants' submissions on admissibility

34. In response to the state party arguments, the complainants submits that, the communication meets the requirements of article 56(5) of the Charter as all national remedies have been exhausted. The complainants concede that in terms of the hierarchy of the courts of Zimbabwe, the Supreme Court is the final arbiter on constitutional and human rights matters. They argue that section 24 of the Constitution of Zimbabwe stipulates that an individual who feels that her or his rights as enshrined in the Chapter on the Declaration of Rights in the Constitution, have been or are likely to be infringed shall approach the Supreme Court as a court of first instance. The complainants state that the Supreme Court was approached, and it ruled that accreditation and registration of journalists was constitutional and mandatory, for any individual who intends to pursue the profession of journalism in Zimbabwe. Pursuant to that decision,[2] the complainants claim they had no other means of

[2] Judgment No SC 136\02; Const. Application No 252\02; Supreme Court of Zimbabwe, Chidyausiku CJ, Sandura JA, Cheda JA, Ziyambi JA & Malab JA; Harare, 21 November 2002 & 5 February 2004.

remedying the situation but to approach the African Commission. They argue therefore that the requirement of article 56(5) of the Charter has been met.

35. The complainants state further that, the Supreme Court decision which upheld the requirement for compulsorily registration by the MIC is tantamount to an intrusion in the actual right to freedom of expression. The complainants submit that the African Commission has held in *Media Rights Agenda and Other v Nigeria*,[3] that onerous conditions of accreditation and total discretion by the registration board, effectively giving government the power to prohibit publication of newspapers or magazines are akin to censorship and seriously endanger the right of the public to impart and receive information in contravention of article 9(1) of the Charter.

36. The complainants argue further that the Supreme Court found that the proscription of false news can never be said to be unconstitutional, noting that the reasoning of the Supreme Court was that falsehood is the antithesis of the truth of information.[4] They claim that the Supreme Court found that there was no constitutional protection for false news.

37. They claim it is on that basis that they have brought their communication to the African Commission, arguing that there is no domestic remedy available in Zimbabwe to afford protection to a distributor of false news or fiction or false cartoons.

Decision of the African Commission on admissibility

38. The African Commission, having considered the criteria on admissibility under article 56 of the Charter, is satisfied that the communication indicates the authors, that it falls within the *ratione materiae* and *ratione temporis* of the Charter and the Constitutive Act, and is therefore compatible with the Charter. It does not use disparaging language, it has provided information and facts on the decision of the Supreme Court of Zimbabwe, including affidavits on which the complaint is based. It was submitted within reasonable time, and is not a subject of adjudication in any other tribunal and nor previously settled by another international tribunal.

39. The only criterion which the African Commission has to look at is whether the communication satisfies article 56(5). Having analysed the submissions by both parties on the question of exhaustion of domestic remedies, the African Commission is satisfied that in the light of the Supreme Court decision, Constitutional Application No

3 Communications 105/1993, 128/1994 and 130/1994 [(2000) AHRLR 200 (ACHPR 1998)].

4 In that decision, the Supreme Court stated that 'the Constitution confers no right on an individual to falsify or fabricate information or publish falsehoods. Section 20 of the Constitution protects the right to impart and receive information, not falsehoods. Falsehoods are not information'.

252/02,[5] spelling out the position of the law in Zimbabwe concerning the provisions applicable to the accreditation and registration of journalists, which is a binding authority in Zimbabwe, it would have been futile for the complainants to go to the Supreme Court in order to exhaust domestic remedies.

40. Taking into account all the foregoing submissions, the Commission decides to declare the communication admissible.

Consideration of the merits

Complainants' submissions

41. The complainants argue that the emphasis on the right to freedom of expression in ensuring democracy is such that regulation, other than self-regulation, is undesirable in a democratic society. They argue further that practical considerations for media regulation arise from the need for resource management, need to ensure equal access, competition laws and minority rights, public service considerations, consumer protection and revenue considerations. All the aforesaid factors are applicable to electronic media house regulation and not applicable to regulation of journalists.

42. The complainants submit further that there is no necessity for additional measures to control journalists in Africa because in virtually all jurisdictions in Africa, there are civil and criminal sanctions for *injuria* and defamation which already regulate the conduct of journalist in the discharge of their work.

43. The complainants submit further that the registration requirements and procedures are unduly intrusive and burdensome, particularly inquiries into individuals' private details such as one's marital status, passports numbers, expiring dates of passports, place of issue of passports, driver's license numbers, demands for residential addresses, and details related to any criminal record. Others include demand for details concerning specific assignments to be covered by the journalists, all of which impose prior self-censorship as a precondition to acquire accreditation. They argue that the accreditation form have to be examined and approved by both the Permanent Secretary and the Minister, thereby establishing control of journalists by central government.

44. According to the complainants, the fact that one has to be accredited to a media house and obtain the support of a media house to successfully apply for accreditation amounts to restriction on the practice of journalism and the free flow of information.

5 n 3 above.

45. They submit that a foreign journalist is required to pay as much as US$ 1 050 for accreditation and registration to carry out a temporary assignment.

46. The complainants submit further that even more restrictive and unreasonable is the fact that there is no provision for a permanent accreditation of foreign correspondents. That the US$ 12 000 requirement per annum accreditation and registration fees for a foreign news agency representative is unduly burdensome, unaffordable for most people in Zimbabwe and an unreasonable restriction on freedom of expression.

47. They claim that the temporary nature of the accreditation is itself particularly ominous and different from the accreditation required to cover specific events. The complainants argue that accreditation is not aimed at giving the journalist access, but that it is apparent from the legislation that the accreditation is aimed at controlling and even obstructing the work of a journalist.

48. The complainants argue further that, compliance with formal but onerous and intrusive pre-registration requirements stipulated in the statutory instrument does not guarantee registration of a journalist because the MIC has discretion to decide whether or not to register the journalist.

49. The complainants urge the African Commission to draw inspiration from legal precedent developed in other regional human rights systems. They specifically draw the attention of the African Commission to article 13 of the American Convention on Human Rights, which provides, *inter alia,* that:

> (1) Everyone has the right to freedom of thought and expression. This includes freedom to seek, receive and impart information and ideas of all kinds regardless of frontier, either orally or in writing, in print, in the form of art or through any other medium of one's choice.

Article 13 paragraph 3, provides that:

> The right of expression may not be restricted by indirect methods or means such as the abuse of government or private controls over newsprint, radio broadcasting frequencies or equipment used in dissemination of information or by any other means tending to impede the communication and circulation of ideas and opinions.

50. The complainants also cite an advisory opinion of the Inter American Court of Human Rights on compulsory registration which dealt with the question of registration of journalists in Costa Rica. The Court stated in this Advisory Opinion that:[6]

> It is the mass media that make the exercise of freedom of expression a reality. This means that the conditions of its use must conform to the requirements of this freedom, with the result that there must be, inter alia, a plurality of means of communication, the barring of all monopolies thereof, in whatever form, and guarantees for the protection of freedom and independence of journalists. The compulsory licensing of journalists does not comply with the right to freedom of

[6] OC-5/85, 13 November 1985, Ser A No 5.

expression because the establishment of a law that protects the freedom and independence of anyone who practices journalism is perfectly conceivable without the necessity of restricting the practice only to a limited group of the community.

51. According to the complainants, article 13 of the American Convention on Human Rights defines freedom of expression in a way similar to that of article 9 in the Charter; as 'freedom to seek, receive, and impart information and ideas of all kinds.'

52. The complainants note that the right protected by article 13 of the American Convention (similar to the right protected under article 9 of the Charter) has a special scope and character, evidenced by the dual aspect of freedom of expression. That, on the one hand, the prohibition of any restrictions or impediments by governments or privately against the free expression, dissemination of information, communication or circulation of thoughts and ideas, and in that sense, it is a right that belongs to each individual. Its second aspect implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others.

53. The complainants also submit that 'if you control journalists you control expression, controls are an obstacle to the means of expression and therefore against freedom of expression itself'. According to them, the respondent state's attempts to distinguish between freedom of the press and freedom of expression are not sustainable. They add that, although freedom of expression encompasses a wider range of activities than freedoms of the press, in that sense the two are different. Freedom of the press is an element of freedom of expression.

54. The complainants argue further that, freedom of expression goes further than the theoretical recognition of the right to speak or to write. They submit that it also includes and cannot be separated from the right to use whatever medium is deemed appropriate to impart ideas and to have them reach as wide an audience as possible.

55. The complainants argue that both the Inter-American Convention on Human Rights and the Universal Declaration of Human Rights proclaim that freedom of thought and expression includes the right to impart information and ideas through 'any ... medium', and this means that the expression and dissemination of ideas and information are indivisible concepts. They submit that, the restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely. They argue further that the legal rules applicable to the press and to the status of those who dedicate themselves professionally to it derive from this concept. They state that in its social dimension, freedom of expression is a means of the interchange of ideas and information among human beings and for mass communication and includes the right of each person to seek to communicate his own

views to others, as well as the right to receive opinions and news from others.

56. The complainants refer the African Commission to the Zambian case of *Francis Kasoma v The Attorney-General*,[7] where compulsory registration of journalists ordered by the Zambian government was declared unconstitutional by the Zambian High Court in 1997. According to the complainants, in that case, journalists were obliged to become members of a Media Association of Zambia and to register with a statutory Media Council. They submit that the High Court of Zambia quashed the decision and among the reasons given by the High Court Judge is that:

> I do not in my view consider the decision to constitute the Media Council of Zambia to be in furtherance of the general objectives and purpose of the Constitutional powers, among them, to promote democracy and related democratic ideals such as freedom of expression, and press freedom in particular ... The decision to create the Media Council of Zambia is no doubt going to have an impact ... on freedom of expression in that failure of one to affiliate himself to the Media Council of Zambia, or in the event of breach of any moral code determined by the council would entail losing his status as a journalist, and with the denial of the opportunity to express and communicate his ideas through the media.

57. The High Court in Zambia went on to state that

> in light of the above it cannot be seriously argued that the creation of the Media Association or any other regulatory body by the government would be in furtherance of the ideal embodied in the Constitution, vis-à-vis freedom of expression and association. Consequently, I find that the decision to create the Media Association is not in furtherance of the objectives or purposes embodied in the Constitution in particular those protected in articles 20 and 21 [which guarantee freedom of expression and association].

58. The complainants further submitted that the provision under section 84 of the AIPPA, which makes it compulsory to renew accreditation after a maximum period of 12 months, ie at the end of each calendar year, places journalists in a position of permanent insecurity. This, according to them, will have an extremely chilling effect on their ability to freely practice their trade and will inevitably lead to various degrees of self-censorship.

59. The complainants argue that in those very rare instances where expression really does pose a risk to society, as in the example from Rwanda cited by the respondent, this should be addressed through the criminal law, not by generalized restrictions on all journalists.

60. The complainants submit that the real purpose of the licensing system established by AIPPA is to provide the government with a measure of control over journalism and to prevent, or at least limit critical reporting. As a result, they claim, the licensing system for journalists imposed by the contested provisions of AIPPA does not serve a legitimate aim as required under international law.

7 Zambia High Court civ. Case N0. 95/HP/2959.

61. In conclusion, the complainants submit that modern jurisprudence accepts that it is contrary to freedom of expression to criminalize falsehoods, and to support this argument, they cite *Chavunduka and Another v Minister of Home Affairs and Another*,[8] where the Supreme Court of Zimbabwe observed that:

> Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false. As the revered Holmes J so wisely observed in *United states v Schwimmer* 279 US 644 (1929) at 654, the fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought-not free thought of that we hate.' Mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression.

Respondent state's arguments on the merits

62. The respondent state on its part submits that the complainants have failed to establish a violation of article 9 of the Charter, adding that it is misleading to suggest that the MIC is susceptible to political manipulation and control. According to the respondent state, the operations of the MIC are controlled and managed by a board which consists of no fewer than five members and more than seven members of whom at least three shall be nominated by an association of journalists and an association of media houses. The respondent state submits that the complainants' suggestion that the registration process is prejudicial to them is baseless as there are other independent journalists who have been registered even though their work is critical of the government.

63. It is incorrect, the respondent state argues, to suggest that section 80 of the AIPPA unreasonably restricts the right to freedom of expression and dissemination of information. According to the respondent state, section 80 restricts not all falsehoods, but only those that are wilfully published and that are likely to injure the public interest. In the opinion of the respondent state, such restrictions are reasonably necessary and cannot be held to be excessively invasive of the enjoyment of the guaranteed right.

64. On the allegation that the AIPPA seeks to regulate the media, the respondent state submits that the Constitutional Court has already held that accreditation of journalists and the licensing of electronic media is constitutional as long as the requirements for such accreditation and licensing are not onerous.[9] The respondent state

8 2000 Vol 1 ZLR page 552 at 558.

9 The state in this regard makes references to the *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Minister of State for Information and Publicity and 2 others* SC-111-04, *Association of Independent Journalists and Others v The Minister of State for Information and Publicity and 2 Others* SC-136-02, and *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe and Others* SC-128-02.

also made reference to the provisions of article 19 of the ICCPR and article 9 of the African Charter to the effect that the right is subject to regulation by law.

65. In response to the complainants' submission that journalists should not be regulated by statute but should be self-regulating, the respondent state submits that this amounts to no regulation, and goes beyond what is permissible, adding that regulation of the media including licensing of journalist is permissible.

66. The respondent state argues further that in terms of article 9 of the African Charter together with article 19(3) of the ICCPR, freedom of expression is not absolute. Those restrictions are permissible if provided by law and are necessary. The respondent state cites the case of *Athukorale and others, supra* where it was held that:

> Absolute and unrestricted individual rights do not and cannot exist in a modern state. The welfare of the individual, as a member of collective society, lies in a happy compromise between his rights as an individual and the interests of the society to which he belongs.

67. The respondent state submits that the Constitution of Zimbabwe contains a justiciable Bill of Rights and section 20(1) provides that everyone has a right to freedom of expression. It states further that, in terms of section 20(2) of the Constitution, the right can be restricted.

68. The respondent state argues further that in terms of the Zimbabwe Constitution the freedom of expression is guaranteed with permissible limitations. This is in accordance with article 9 of the African Charter which guarantees the enjoyment of the right 'within the law', and according to the respondent state, the 'law' referred to in article 9 of the Charter, relates to 'domestic law'.

69. The respondent state submits that what is explicit in the African Charter is the recognition that the exercise of the right is subject to national law, adding that the complainants conveniently avoided to mention or place emphasis on the wording of the article in question.

70. AIPPA, according to the respondent state, is a law made in terms of the Constitution of Zimbabwe and section 79 thereof has been held by the Zimbabwean Constitutional Court as constitutional. The state cites *Associate Newspapers of Zimbabwe (Pvt) v The Minister of State for Information and Publicity and 2 Others SC 111/04* and *Association of Independent Journalists and 2 Others v The Minister of State and 2 Others SC. 136/02* to support this submission.

71. The state submits further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations

provided for by the Constitution, and according to the state, section 79 of AIPPA passes the test.

72. The respondent state states further that the registration exercise is of a technical nature, it is not onerous, and urges the Commission to find section 79 of AIPPA does not contravene the right to freedom of expression under article 9 of the African Charter.

73. With respect to section 80 of AIPPA, the respondent state submits that the provision makes it an offence to intentionally publish falsehoods which threatens the interests of defence, public safety, public order, the economic interests of the state, public morality or public health or are injurious to reputation, rights and freedoms of other persons.

74. The respondent state concludes its submission by arguing that, the provisions of AIPPA being challenged by the complainants have been declared constitutional and hence comply with the qualification under the African Charter's exercise of the freedom of expression 'within the law'.

75. The respondent state calls on the Commission to dismiss the communication.

Decision of the African Commission on the merits

76. In the present communication, the complainants allege that section 79(1) and section 80 of the AIPPA contravene article 9 of the African Charter. Section 79(1) of AIPPA provides that 'no journalist shall exercise the rights provided in section 78 in Zimbabwe without being accredit by the Commission.' Section 78 meanwhile provides that:

> (1) Subject to this Act and any other Law, a Journalist shall have the following rights (hereinafter in this Act collectively referred to as 'journalistic privilege'),
>
> (2) to enquire, gather, receive and disseminate information;
>
> (3) to visit public bodies with the express purpose of carrying out duties as a journalist;
>
> (4) to get access to documents and materials as prescribed in this Act;
>
> (5) to make recordings with the use of audio-video equipment, photography and cine-photography;
>
> (6) to refuse to prepare under his signature reports and materials inconsistent with his convictions;
>
> (7) to prohibit the publication of, remove his or her signature from or attach conditions to the manner of using a report or material whose content was distorted, in his or her opinion, in the process of editorial preparation.

77. Section 80 provides for instances which constitute abuse of journalistic privileges, as well as the punishment that goes with such abuse. Section 80(1) provides that:

> (a) journalist shall be deemed to have abused his journalistic privilege and committed an offence if he does the following: falsifies or fabricates information; publishes falsehoods except where he is a

freelance journalist, collects and disseminates information on behalf of a person other than the mass media service that employs him without the permission of his employer; contravenes any of the provisions of this Act;

78. Section 80(2) states that:

(a) person who contravenes subparagraphs (a) to (d) of Subsection (1) shall be guilty of an offence and liable to a fine not exceeding one hundred thousand dollars or to imprisonment for a period not exceeding two years.

79. In the present communication, the Commission is called upon to make a determination whether section 79(1) which requires compulsory accreditation of journalists, and section 80 which prohibits and punishes the publication of falsehood violate the right to freedom of expression guaranteed under article 9 of the African Charter.

80. Article 9 of the African Charter provides that:

(1) Every individual shall have the right to receive information.

(2) Every individual shall have the right to express and disseminate his opinions within the law.

81. Article 9 of the Charter guarantees the right to freedom of expression, which includes the right to receive information and the right to express and disseminate opinions within the law.

82. The complainants submit that the law imposed by the respondent state is unreasonable and restrictive to freedom of expression, thus violates article 9 of the Charter.

83. The respondent state on the other hand contends that the restrictions imposed by the AIPPA are reasonable, within the law and necessary for maintenance of public order. The respondent state argues further that the right to freedom of expression is guaranteed within permissible limitations, and that it is not an absolute and unrestricted individual right.

84. To determine whether the requirements of section 79(1) and section 80 of AIPPA are in contravention of the African Charter, the African Commission will examine what these two provisions mean, and also examine the meaning of article 9 of the Charter, with a view to determine whether or not there is a violation of article 9 of the African Charter.

85. Section 79 of AIPPA reads as follows:

No journalist shall exercise the rights provided in section seventy eight in Zimbabwe without being accredited by the Commission ... Any person who wishes to be accredited as a journalist shall make an application to the Commission in the form and manner and accompanied by the fee, if any, prescribed: Provided that a mass media service or news agency may file an application for accreditation on behalf of journalists employed by such mass media service or news agency ... (5) The Commission may accredit an applicant as a journalist and issue a press card to the applicant if it is satisfied that the applicant — (a) has complied with the prescribed formalities; and (b) possesses the

prescribed qualifications; and (c) is not disqualified by virtue of subsection (2), or applies for accreditation in terms of subsection (4).

Every news agency that operates in Zimbabwe, whether domiciled inside or outside Zimbabwe, shall in respect of its local operations not employ or use the services of any journalist other than an accredited journalist who is a citizen of Zimbabwe, or is regarded as permanently resident in Zimbabwe by virtue of the Immigration Act [Chapter 4:02]: Provided that the news agency may employ or use the services of a journalist referred to in subsection (4) for the duration of that journalist's accreditation.

86. The complainants are asking the African Commission to determine whether the conditions stipulated under section 79 amount to restrictions, which constitute a violation of article 9 of the African Charter. It is evident from the above provision that the compulsory accreditation of journalists can result in the imposition of liability, including penal sanction for those who cannot, or may not be able to fulfil the requirements of accreditation, and to that end are deemed to intrude on the professional practice of journalism.

87. Does compulsory accreditation in itself affect the enjoyment of freedom of expression?

88. Section 79(1) requires that before a journalist practices his/her profession within the respondent state's territory, he/she must apply for and obtain a certificate of accreditation from the MIC. Section 83 of the AIPPA makes it clear that '(1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist.'

89. Official accreditation of a journalist is a mandatory precondition for operating within the respondent state. Criminal sanctions are imposed for operating without accreditation. There are mandatory requirements for accreditation and the possession of the requisite qualifications does not guarantee provision of a certificate of accreditation.

90. The African Commission considers that registration procedures are not in themselves a violation of the right to freedom of expression, provided they are purely technical and administrative in nature and do not involve prohibitive fees, or do not impose onerous conditions. The requirements set out in AIPPA, in the opinion of the Commission, undoubtedly have a negative effect on the exercise of freedom of expression. There are no good grounds for official involvement in the registration of journalists. It creates considerable scope for politically motivated action by the authorities. The regulation of the media should be a matter for self-regulation by journalists themselves through their professional organizations, or associations.

91. A regulatory body such as the MIC whose regulations are drawn up by government cannot claim to be self-regulatory. Any act of

establishing a regulatory body by law brings the body under the control of the state. This is exactly the case with the AIPPA.

92. The compulsory accreditation of journalists has been held at both national and international levels to be a hindrance to the effective enjoyment of the right to freedom of expression.

93. In its advisory opinion on *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*,[10] the Inter-American Court of Human Rights emphasized the important role of the press in the development of a free and democratic society. The Costa Rican government approached the Court for an advisory opinion whether 'the compulsory membership of journalists and reporters in an association prescribed by law for the practice of journalism is permitted or included among the restrictions or limitations authorized by articles 13 and 29 of the American Convention on Human Rights'. In responding to the Costa Rican government's question the court stated that a law providing for compulsory association and, thus, barring non-members from the practice of journalism was incompatible with the American Convention, as it would deny access to the full use of the news media as a means of expressing opinions or imparting information.

94. The Inter-American Court noted further that compulsory licensing of journalists or the requirement of a professional identification card does not mean that the right to freedom of thought and expression is being denied, nor restricted, nor limited, but only that its practice is regulated. Compulsory licensing, the Court held, 'seeks the control, inspection and oversight of the profession of journalists in order to guarantee ethics, competence and the social betterment of journalists ...'. The accreditation of journalists may thus be beneficial to the profession, provided though it is done in a manner that does not infringe on the effective enjoyment of the rights of journalists to freely express themselves or receive and disseminate information.

95. Distinguishing the compulsory registration of persons of other professions from the registration of journalists, the Court held that:

> within this context, journalism is the primary and principal manifestation of freedom of expression of thought. For that reason, because it is linked with freedom of expression, which is an inherent right of each individual, journalism cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional ... The argument that a law on the compulsory licensing of journalists does not differ from similar legislation applicable to other professions does not take into account the basic problem that is presented with respect to the compatibility between such a law and the Convention. The problem results from the fact that article 13 expressly protects freedom 'to seek, receive, and impart information and ideas of all kinds ... either orally, in writing, in

[10] Advisory Opinion OC-5/85, 13 November 1985, Inter-Am Ct HR (Ser A) No 5 (1985).

> print ...'. The profession of journalism — the thing journalists do — involves, precisely, the seeking, receiving and imparting of information. The practice of journalism consequently requires a person to engage in activities that define or embrace the freedom of expression which the Convention guarantees.[11]

96. The Court went on to state that:

> this is not true of the practice of law or medicine, for example. Unlike journalism, the practice of law and medicine — that is to say, the things that lawyers or physicians do — is not an activity specifically guaranteed by the Convention. It is true that the imposition of certain restrictions on the practice of law would be incompatible with the enjoyment of various rights that the Convention guarantees ... But no one right guaranteed in the Convention exhaustively embraces or defines the practice of law as does article 13 when it refers to the exercise of a freedom that encompasses the activity of journalism. The same is true of medicine.[12]

97. The African Commission has considered the opinion expressed by the Inter- American Court on Human Rights in the Costa Rican case, and finds a great deal of persuasion in the reasoning and the approach adopted by the Inter American Court on the question of compulsory licensing of journalists. The Commission is convinced that the question of compulsory accreditation is the same as compulsory licensing which was addressed by the Inter-American Court. The Commission is inclined to accept the argument that compulsory licensing or accreditation amounts to a restriction of the freedom to practice the journalist profession where it aims to control rather than regulate the profession of journalism. Regulation is acceptable where it aims at the identification of journalists, the maintenance of ethical standards, competence, and the betterment of the welfare of journalists. In other words the aim of registration should be for purposes of betterment of the profession rather than its control, since control by its nature infringes the right to express oneself. Article 60 and 61 of the African Charter enjoin the Commission to seek inspiration from other international human rights instruments, precedent and doctrine.

98. The Inter-American Court found that compulsory licensing aimed at controlling journalists was a violation of article 13 of the American Convention. By applying the same logic, and analogy to the conditions stipulated for compulsory accreditation under AIPPA, without which, one could not practice journalism, the African Commission finds that section 79 of AIPPA constitutes a violation of article 9 under the African Charter.

99. Section 80 of AIPPA makes it clear that

> (1) No person other than an accredited journalist shall practice as a journalist nor be employed as such or in any manner hold himself out as a journalist. No person who has ceased to be an accredited journalist as a result of the deletion of his name from the roll, or who has been suspended from practising as a journalist, shall, while his name is so

11 Paras 71-73.
12 Para 74.

> deleted, or is so suspended, continue to practice directly or indirectly as a journalist, whether by himself or in partnership or association with any other person, nor shall he, except with the written consent of the Commission, be employed in any capacity whatsoever connected with the journalistic profession.

100. The respondent state argued that the restrictions could be imposed in the interest of public order. It also stated that the limitations are permissible and that the exercise of the right is not absolute. The African Commission having looked at section 79 of AIPPA, holds that the provision does not mention if the said conditions were made in the interest of public order. In fact the reading of article 9(2) suggests that the phrase 'within the law' applies to the actual dissemination and expression of opinion and ideas, rather than pre accreditation conditions. In our view, any conditions prescribed for the accreditation of journalists should be aimed at facilitating, rather than impeding the exercise of the right. In *Ouko v Kenya*,[13] the African Commission commenting on article 9 stated the following; 'the above provision guarantees to every individual the right to free expression, within the confines of the law. Implicit in this is that if such opinion is contrary to laid down laws, the affected individual or government has the right to seek redress in a court of law. Herein lies the essence of the law of defamation ...'.

101. The complainants argue that, the accreditation conditions are onerous, and aimed at controlling journalists through the exercise of prior self censorship, and obstruction of the work of journalists. They submitted that there are civil and criminal sanctions within Zimbabwe, which provide remedies in the event journalists violate legal provisions during the exercise of their profession. They argue against the conditions for compulsory accreditation.

102. The African Commission agrees with these submissions and states that the presence of laws which provide for civil and other legal sanctions in the event of any injury caused, or infraction of the law by journalists during the practice of their profession, coupled with self regulation, would provide an adequate mechanism for the regulation and control of the journalism profession in a democratic society, without the necessity of the rigorous regime under AIPPA.

103. The right to freedom of expression is protected by national, regional as well as international human rights instruments. One common thread that runs through the freedom of expression guarantees at all levels is the fact that the right to freedom of expression is not absolute.

104. The European Convention on Human Rights regulates freedom of expression in article 10(2) and spells out the legitimate aims that can justify the restriction of freedom of expression, states that:

[13] Communication 232/99, [(2000) AHRLR 135 (ACHPR 2000)].

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

105. Article 13 of the American Convention on Human Rights guarantees the enjoyment of the right of freedom of expression. Article 13(2) provides that the exercise of freedom of expression

> shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be established by law to the extent necessary to ensure respect for the rights and reputation of others as well as to protect national security, public order, public health, or morals.

106. Article 10 of the European Convention, 13 of the American Convention and 9 of the African Charter all emphasize that the exercise and enjoyment of freedom of expression can be restricted under lawful conditions.

107. The African Commission has adopted a Declaration of Principles on Freedom of Expression in Africa which upholds certain basic principles aimed at enhancing the enjoyment of freedom of expression. Principle II of the Declaration states that:

> (1) No one shall be subject to arbitrary interference with his or her freedom of expression; and
>
> (2) Any restrictions on freedom of expression shall be provided by law, *serve a legitimate interest and be necessary in a democratic society* (emphasis is added).

The African Commission reads from the foregoing that the right to freedom of expression may be restricted by legislation which aims to protect the public or individuals, against practice of journalism which deviates from certain basic norms and legitimate interests in a democratic society. The restrictions imposed by AIPPA do not fall within those norms or interests.

108. The individual's right to freedom of expression thus carries with it the right to impart information to others. The right to freedom of expression within the context of the African Charter must also be read together with the duties of the individual under article 27. Hence when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas. When the Charter proclaims that every individual has the right to receive information and disseminate opinions, it also implicitly emphasizes the fact that the expression, reception and dissemination of ideas and information are indivisible concepts. This means that restrictions that are imposed on dissemination represent, in equal measure, a direct limitation on the right to express oneself freely.

The Commission is thus of the opinion that the two dimensions of the right to freedom of expression must be guaranteed simultaneously.

109. In the present communication, the respondent state cites the protection of public order, security and public safety as reasons to ensure the regulation of the profession of journalism. It argues further that the practice of journalism does not place it beyond statutory regulation and any such law has however to conform to the stringent requirements of limitations provided for by the Constitution. The Commission finds that the notion of public order in a state implies conditions that ensure the normal and harmonious functioning of institutions on the basis of an agreed system of values and principles. The Commission notes however that maintenance of public order in the exercise of the freedom of expression is perfectly conceivable without the necessity of restricting the practice of journalists.

110. Further, the same concept of public order in a democratic society demands the greatest possible amount of information. It is the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole that ensures this public order.

111. In the instant communication, the restrictions imposed on the practice of individual journalists can thus not be justified on the grounds of public order.

112. With regards to the respondent's assertion that the restrictions imposed by the AIPPA are within the domestic law of Zimbabwe, in conformity with section 20(2) of the Constitution of the respondent state, the Commission notes that, the meaning of the phrase 'within the law' in article 9(2) must be interpreted in the context of Principle II as elaborated under the Declaration of Principles on Freedom of Expression stated hereinabove. In other words, the meaning of the phrase 'within the law', must be considered in terms of whether the restrictions meet the legitimate interests, and are necessary in a democratic society. In addition, the concept of 'within the law' employed in the Charter cannot be divorced from the general concept of the protection of human rights and freedoms.

113. In *Jawara v The Gambia*,[14] the African Commission elaborated the meaning of such phrases such as; 'in accordance with the law', or 'previously laid down by law' or 'within the law'. In that communication, the Republic of The Gambia defended arbitrary arrests and detention and stated that it was acting within the confines of legislation 'previously laid down by law', as required by the wordings of article 6 of the Charter.

[14] Communications 147/95 and 149/96.

114. The Commission rejected the arguments by The Gambia and restated its decision in *Abubakar v Ghana*,[15] that

> competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution or international human rights standards. This principle applies not only to freedom of association but also to all other rights and freedoms. For a state to avail itself of this plea, it must show that such a law is consistent with its obligations under the Charter ...

115. The Commission adopts a broader interpretation of phrases such as 'within the law' of 'in accordance with the law' in order to give effect to the protection of human and peoples' rights. To be 'within the law' the domestic legislation must be in conformity with the African Charter or other international human rights instruments and practices. The respondent state can not argue that the limitation placed by AIPPA was permissible 'within the law' ie within its domestic law. This would be tantamount to admitting that the exercise of freedom of expression is left solely at the discretion of each state party. This, in the opinion of the Commission, will cause jurisprudential/interpretation chaos, as each state party will have its own level of protection based on their respective domestic laws.

116. The African Commission succinctly made this point in *Constitutional Rights Project et al v Nigeria*[16] where it stated the following:

> (a)ccording to article 9(2) of the Charter, dissemination of opinions may be restricted by law. This does not however mean that national law can set aside the right to express and disseminate one's opinion guaranteed at the international level: this would make the protection of the right to express one's opinion ineffective. To permit national law to take precedence over international law would defeat the purposes of codifying certain rights in international law and indeed, the whole essence of treaty making.

117. The Commission therefore finds that the respondent state's arguments that the accreditation of journalists and prohibition of falsehood are on grounds of public order, safety and for the protection of the rights and reputation of others, to be unsustainable and an unnecessary restriction of the individual's practice of journalists.

118. Similarly, by preventing journalists from freely exercising their right to freedom of expression, the respondent state inevitably violates the freedom of expression of the Zimbabwean society by depriving the society the right to receive information due to the restrictions imposed on the journalists' right to disseminate information.

119. The African Commission therefore finds that section 80 of the Access to Information and Protection of Privacy Act (Chapter 10:27)

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15 Communication 103/1993 [(2000) AHRLR 124 (ACHPR 1996)].

16 Consolidated communication 140/94, 141/94, 145/95 13th Annual Activity Report. 1999-2000).

of 2002, was not necessary, it did not address any legitimate interest such as to require compulsory accreditation of journalists. It reiterated the restrictions imposed by section 79, without giving any justification for such restrictions. The African Commission therefore finds that section 80 is incompatible with article 9 of the African Charter on Human and Peoples' Rights.

120. The African Commission finds further that while accurate reporting is the goal to which all journalists should aspire, there will be circumstances under which journalist will publish or disseminate information, opinion or ideas, which will contravene other persons' reputations or interests, national security, public order, health or morals. Such circumstances cannot be foreseen during accreditation. In such circumstances, it is sufficient if journalists have made a reasonable effort to be accurate and have not acted in bad faith.

121. The African Commission acknowledges the argument by the respondent state that the rights of individuals, including the right under article 9 are not absolute, hence the inclusion of article 27 of the Charter on the duties of individual towards others. In the case of journalists, when they fail in their duty to respect the rights of others, when exercising their rights to free expression, then their right ceases to be absolute. It is then that the civil and other legal remedies will take their natural course. The African Commission holds that the Zimbabwe domestic legal system can grant remedies to such false publication, and which therefore obviate the necessity for the restrictions complained against.

122. To adopt legislation such as AIPPA aimed at or under the pretext of protecting public order, health or morals, is tantamount to imposing conditions for prior censorship.

123. The African Commission is satisfied that sections 79 and 80 of AIPPA impose restrictive accreditation conditions and excessive burden on journalists and restrict their effective enjoyment of the right to freedom of expression.

124. The Commission thus concludes that the arguments advanced by the respondent state in justification of the restriction of the journalists' right to freedom of expression are incompatible with obligations assumed by the respondent state to respect article 9 of the Charter. Accordingly, the Commission considers that the communication discloses a violation of article 9 of the Charter.

125. In view of the above reasoning, the African Commission recommends that the respondent state:

(i) Repeal sections 79 and 80 of the AIPPA;

(ii) Decriminalize offences relating to accreditation and the practice of journalism;

(iii) Adopt legislation providing a framework for self regulation by journalists;

(iv) Bring AIPPA in line with article 9 of the African Charter and other principles and international human rights instruments; and

(v) Report on the implementation of these recommendations within six months of notification thereof.

AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

SENEGAL

Yogogombaye v Senegal

(2009) AHRLR 315 (ACtHPR 2009)

Michelot Yogogombaye v The Republic of Senegal

Application 001/2008, ruling 15 December 2009
Judges: Mutsinzi, Akuffo, Mafoso-Guni, Ngoepe, Fannoush, Guindo, Niyungeko, Ouguergouz, Mulenga

Lack of jurisdiction since state party had not made declaration allowing for direct access by individuals and NGOs

Jurisdiction (lack of jurisdiction, 39, 40)

1. By an application dated 11 August 2008, Mr Michelot Yogogombaye (hereinafter referred to as 'the applicant'), a Chadian national, born in 1959 and currently residing in Bienne, Switzerland, brought before the Court a case against the Republic of Senegal (hereinafter referred to as 'Senegal'), 'with a view to obtaining suspension of the ongoing proceedings instituted by the Republic and State of Senegal with the objective to charge, try and sentence Mr Hissein Habré, former Head of State of Chad, presently asylumed in Dakar, Senegal'.

2. In accordance with article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as 'the Protocol'), and rule 8(2) of the Interim Rules of Court (hereinafter referred to as 'the Rules'), Judge El Hadj Guissé, member of the Court, and a national of Senegal, recused himself.

3. The applicant sent his application to the Chairperson of the African Union Commission by electronic mail dated 19 August 2008. This application was received in the Court registry on 29 December 2008, with a covering correspondence from the legal counsel of the African Union Commission dated 21 November 2008.

4. The Registry acknowledged receipt of the application, and notified the applicant by letter dated 2 January 2009, that all communications meant for the Court must be addressed directly to it, at its seat in Arusha, Tanzania.

5. In accordance with rule 34(6) of the Rules, the Registry served a copy of the application on Senegal by registered post on 5 January 2009; also in accordance with rule 35(4)(a) of the Rules, the Registry invited Senegal to communicate to it, within 30 days, the names and addresses of its representatives.

6. Pursuant to rule 35(3) of the Rules, the Registry also informed the Chairperson of the African Union Commission about the application by letter of that same date.

7. The applicant informed the Registry, by letter dated 30 January 2009 received at the Registry on 5 February 2009, that he would represent himself in the matter that he had brought before the Court.

8. Senegal acknowledged receipt of the application and transmitted to the Court, the names of its representatives mandated to represent it before the Court, by letter of 10 February 2009 received by the Registry on the same day, by fax.

9. By another faxed letter dated 17 February 2009 received in the Registry on the same day, Senegal requested the Court to extend the time limit 'to enable it to better prepare a reply to the application'.

10. By an order dated 6 March 2009, the Court granted the request of Senegal and extended, up to 14 April 2009, the period within which to submit its reply to the application.

11. A copy of the order was served on the applicant, and on Senegal, by facsimile transmission dated 7 March 2009.

12. Senegal submitted its statement of defence within the time limit indicated in the aforesaid order, in which it raised preliminary objections regarding the jurisdiction of the Court and admissibility of the application, and also addressed substantive issues.

13. The Registry served on the applicant, under covering letter of 14 April 2009, a copy of the statement of defence by Senegal.

14. The applicant having failed to respond to the said statement, the Registry by another letter dated 19 June 2009, notified the applicant that if he failed to respond within 30 days, the Court would assume that he did not want to present any submission in reply to the statement of defence, in accordance with rule 52(5) of the Rules.

15. On 29 July 2009, the applicant acknowledged receipt of the statement of defence and submitted that: 'the afore-mentioned reply did not introduce any new element likely to significantly modify the views I expressed in my initial application. I therefore maintain the said views in their entirety, and resubmit myself to the authority of the Court.'

16. In view of the facts, the Court did not deem it necessary to hold a public hearing and, consequently, decided to close the case for deliberation.

17. In his application, the applicant averred, among other things, that 'the Republic and State of Senegal and the Republic and State of Chad, members of the African Union, are parties to the Protocol [establishing the African Court on Human and Peoples' Rights] and have, respectively, made the declaration prescribed in article 34(6) accepting the competence of the Court to receive applications submitted by individuals'.

18. With regard to the facts, the applicant submitted that Hissein Habré, former President of Chad, is a political refugee in Senegal since December 1990, and that in 2000, he was suspected of complicity in crimes against humanity, war crimes and acts of torture in the exercise of his duties as Head of State, an allegation based on the complaints by the presumed victims of Chadian origin.

19. The applicant further averred that, by decision of July 2006, the African Union had mandated Senegal to 'consider all aspects and implications of the Hissein Habré case and take all appropriate steps to find a solution; or that failing, come up with an African option to the problem posed by the criminal prosecution of the former Head of State of Chad, Mr Hissein Habré ...'.

20. He also submitted that, on 23 July 2008, the two chambers of the Parliament of Senegal adopted a law amending the Constitution and 'authorizing retroactive application of its criminal laws, with a view to trying exclusively and solely Mr Hissein Habré'.

21. He alleged that by so doing, Senegal violated the 'sacrosanct principle of non-retroactivity of criminal law, a principle enshrined not only in the Senegalese Constitution but also in article 7(2) of the African Charter on Human and Peoples' Rights' to which Senegal is a party.

22. According to the Applicant, the action of Senegal also portrayed that country's intention 'to use in abusive manner, for political and pecuniary ends, the mandate conferred on it by the African Union in July 2006'. Further, according to the applicant, in opting for a judicial solution rather than an African solution inspired by African tradition, such as the use of the 'Ubuntu' institution (reconciliation through dialogue, truth and reparations), Senegal sought to use its services as legal agent of the African Union for financial gain.

23. In conclusion, the applicant prayed the Court to:

(1) Rule that the application is admissible;

(2) Declare that the application has the effect of suspending the ongoing execution of the July 2006 African Union's mandate to the Republic and State of Senegal, until such time that an African solution is

found to the case of the former Chadian Head of State, Hissein Habré, currently a statutory political refugee in Dakar in the Republic and State of Senegal;

(3) Rule that the Republic and State of Senegal has violated several clauses of the Preamble and the Articles of the African Charter on Human and Peoples' Rights;

(4) Rule that the Republic and State of Senegal has violated the African Charter on Human and Peoples' Rights and, in particular, the 10 September 1969 OAU[AU] Convention Governing the Specific Aspects of Refugee Problems in Africa, which came into force on 26 June 1974;

(5) Rule that the case is politically motivated and that the Republic and State of Senegal violated the principle of universal jurisdiction in the ongoing proceedings instituted with a view to indicting and trying Mr Hissein Habré;

(6) Rule that, in the said procedure instituted with a view to indicting and trying Mr Hissein Habré, there is political motivation, pecuniary motivation and the abuse of the said principle of universal jurisdiction, application of which will become, de facto, lucrative for the respondent (estimated to cost 40 billion CFA Francs). This cannot but create precedents in other African countries in which former Heads of State would possibly take refuge;

(7) Rule that the charges brought against Mr Hissein Habré have been abused and abusively used by the Republic and State of Senegal, the French Republic and State and the humanitarian organization, Human Rights Watch (HRW), particularly in view of the media publicity given to, and the media hype into which they turned, the said allegations;

(8) Rule that the said abuse of the principle of universal jurisdiction has destabilizing effect for Africa, that it could impact negatively on the political, economic, social and cultural development of not only the State of Chad but also all other African States, and on the capacity of these states to maintain normal international relations;

(9) Suspend the July 2006 African Union mandate to Senegal and hence the current proceedings instituted by the Republic and State of Senegal with a view to indicting and eventually trying Mr Hissein Habré;

(10) Order the Republic and State of Chad and the Republic and State of Senegal to establish a national 'Truth, Justice, Reparations and Reconciliation' Commission for Chad, on the South African model derived from the philosophical concept of 'Ubuntu' for all the crimes committed in Chad between 1962 and 2008; and in so doing, resolve in African manner the problematic case of the former Chadian Head of State, Hissein Habré;

(11) Recommend that other member states of the African Union assist Chad and Senegal in establishing and putting into operation the said 'Truth, Justice, Reparations and Reconciliation' Commission;

(12) With regard to costs and expenses, grant the applicant the benefit of free proceedings.

24. In its statement of defence, Senegal for its part submitted, *inter alia*, that for the Court to be able to deal with applications brought by individuals, 'the respondent state must first have recognized the jurisdiction of the Court to receive such applications in accordance with article 34(6) of the Protocol establishing the Court'.

25. In this regard, Senegal 'strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights to deal with applications brought by individuals'.

26. Alternatively, Senegal averred that the applicant 'was wrong to meddle in a matter that is the exclusive concern of Senegal, Hissein Habré and the victims' as per the obligations arising from the Convention against Torture; and that it does not see any 'justification for legitimate interest on the part of the applicant to bring the case against the Republic of Senegal'.

27. In addition, Senegal denied the allegations made by the applicant in regard to the 'purported violation [by it] of the principle of non-retroactivity of criminal law', and the 'purported violation of African Union mandate' of July 2006.

28. In conclusion, Senegal prayed the Court to:

> On matters of procedure:
>
> Rule that Senegal has not made a declaration accepting the jurisdiction of the Court to hear applications submitted by individuals;
>
> Rule that the applicant has no interest to institute the application;
>
> Therefore, declare that the application is inadmissible.
>
> On the merits:
>
> Declare and decide that the evidence adduced by Mr Michelot Yogogombaye is baseless and incompetent;
>
> Therefore, strike out the pleas submitted by the applicant as baseless;
>
> Rule that Mr Michelot Yogogombaye should bear the costs incurred by the State of Senegal in regard to the application.

29. In accordance with rules 39(1) and 52(7) of the Rules, the Court has at this stage, to first consider the preliminary objections raised by Senegal, starting with the objection to the Court's jurisdiction.

30. Article 3(2) of the Protocol and rule 26(2) of the Rules provide that 'in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide'.

31. To resolve this issue, it should be noted that, for the Court to hear a case brought directly by an individual against a state party, there must be compliance with, *inter alia*, article 5(3) and article 34(6) of the Protocol.

32. Article 5(3) provides that:

> The Court may entitle relevant non-governmental organizations (NGOs) with observer status before the Commission and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.

33. For its part, article 34(6) of the Protocol provides that:

> At the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

34. The effect of the foregoing two provisions, read together, is that direct access to the Court by an individual is subject to the deposit by the respondent state of a special declaration authorizing such a case to be brought before the Court.

35. As mentioned earlier, the applicant in his submission averred that 'the Republic and State of Senegal and the Republic and State of Chad, both members of the African Union, are parties to the Protocol and have, respectively, made the declaration as per article 34(6) of the Protocol accepting the competence of the Court to receive cases from individuals'. For its part, Senegal in its statement of defence 'strongly asserted that it did not make any such declaration accepting the jurisdiction of the African Court on Human and Peoples' Rights to hear applications brought by individuals'.

36. In order to resolve this issue, the Court requested the chairperson of the African Union Commission, depository of the Protocol, to forward to it a copy of the list of the states parties to the Protocol that have made the declaration prescribed by the said article 34(6). Under covering letter dated 29 June 2009, the legal counsel of the African Union Commission transmitted the list in question, and the Court found that Senegal was not on the list of the countries that have made the said declaration.

37. Consequently, the Court concludes that Senegal has not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organisations. In the circumstances, the Court holds that, pursuant to article 34(6) of the Protocol, it does not have jurisdiction to hear the application.

38. The Court notes, in this respect, that although presented by Senegal in its written statement of defence as an objection on the ground of 'inadmissibility', its first preliminary objection pertains, in reality, to lack of jurisdiction by the Court.

39. The Court further notes that the second sentence of article 34(6) of the Protocol provides that 'it shall not receive any petition under article 5(3) involving a state party which has not made such a declaration' (emphasis added). The word 'receive' should not however be understood in its literal meaning as referring to 'physically receiving' nor in its technical sense as referring to 'admissibility'. It should instead be interpreted in light of the letter and spirit of rule 34(6) in its entirety and, in particular, in relation to the expression 'declaration accepting the competence of the Court to receive applications [emanating from individuals or NGOs]' contained in the first sentence of this provision. It is evident from this reading that the objective of the aforementioned rule 34(6) is to prescribe the conditions under which the Court could hear such cases; that is to say, the requirement that a special declaration should be deposited by the concerned state party, and to set forth the consequences of the absence of such a deposit by the state concerned.

40. Since the Court has concluded that it does not have jurisdiction to hear the case, it does not deem it necessary to examine the question of admissibility.

41. Each of the parties having made submissions regarding costs, the Court will now pronounce on this issue.

42. In his pleadings, the applicant prayed the Court, 'with respect to the costs and expenses of the case', to grant him 'the benefit of free proceedings'.

43. In its statement of defence, Senegal, on the other hand, prayed the Court to 'order Mr Michelot Yogogombaye to bear the cost incurred by the state of Senegal in this case'.

44. The Court notes that rule 30 of the Rules states that 'Unless otherwise decided by the Court, each party shall bear its own costs'.

45. Taking into account all the circumstances of this case, the Court is of the view that there is no reason for it to depart from the provisions of rule 30 of its Rules.

46. In view of the foregoing, the Court, unanimously:

(1) Holds that, in terms of article 34(6) of the Protocol, it has no jurisdiction to hear the case instituted by Mr Yogogombaye against Senegal;

(2) Orders that each party shall bear its own costs.

Separate opinion of Judge Fatsah Ouguergouz

[**47.**] 1. I am in agreement with the views of my colleagues in regard to the conclusions reached by the Court on the question of its jurisdiction and on that of the costs and expenses of the case, and consequently I have voted in favor of the said conclusions. However, I believe that these two issues deserved to be developed in a more comprehensive manner.

[**48.**] 2. The applicant indeed has the right to know why it has taken nearly one year between the date of receipt of his application at the Registry and the date on which the Court took its decision thereon. Senegal, on the other hand, has the right to know why the Court chose to make a solemn ruling on the application by means of a Judgment, rather than reject it de plano with a simple letter issued by the Registry. The two Parties also have the right to know the reasons for which their prayers in respect of the costs and expenses, respectively, of the case, have been rejected; the applicant should also know why his prayer in this regard was addressed on the basis of rule 30 of the Interim Rules of the Court (hereinafter referred to as the 'Rules') on legal costs, whereas the Court could have equally, if not exclusively, treated this prayer on the basis of rule 31 on legal assistance.

[**49.**] 3. However, only the question of the jurisdiction of the Court seems to me to be sufficiently vital, to lead me to append to the Judgment, an exposé of my separate opinion in regard to the manner in which this question should have been treated by the Court.

[**50.**] 4. In the present case, the question of the jurisdiction of the Court is relatively simple. It is that of the Court's 'personal jurisdiction' or 'jurisdiction *ratione personae*' in respect of applications brought by individuals. This is governed by article 5(3) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as 'Protocol') and article 34(6) of the said Protocol which set forth the modalities by which a state shall accept the said jurisdiction.

[**51.**] 5. However, paragraph 31 of the judgment states, not without ambiguity, that for the Court to hear a case brought directly by an individual against a state party, there must be compliance with, *inter alia*, article 5(3) and article 34(6) of the Protocol.

[**52.**] 6. If the only issue referred to here is that of the jurisdiction of the Court, then the expression '*inter alia*' introduces confusion because it lends itself to the understanding that the said jurisdiction is predicated on one or several other conditions that have not been spelt out. However, in my view, there are no other conditions to the jurisdiction of the Court in the case than that which has been specified in article 34(6) of the Protocol, reference to which was made in article 5(3).

[**53.**] 7. Nevertheless, if the expression '*inter alia*' also refers to the conditions for admissibility of the application, there would no longer be any logical linkage between paragraph 31 and paragraph 29 of the judgment in which the Court indicated that it would start by considering the question of its jurisdiction. It would be particularly difficult to understand the meaning of paragraph 39 in which the Court gives its interpretation of the word 'receive' as used in article 34(6) of the Protocol. In paragraph 39, the Court indeed points out that the word 'receive' as applied to the application should not be understood in its literal meaning as referring to 'physically receiving' nor in its technical sense as referring to 'admissibility'; rather it refers to the 'jurisdiction' of the Court to 'examine' the application; that is to say, its jurisdiction to hear the case, as it states very clearly in paragraph 37 *in fine* of the judgment.

[**54.**] 8. Read in light of paragraph 39 of the Judgment, paragraph 31 should therefore be interpreted as referring exclusively to the question of the Court's jurisdiction. Since the meaning of the expression '*inter alia*' is unclear, the Court had better do away with it.

[**55.**] 9. Even if the expression is removed therefrom, paragraph 31 of the judgment, and also paragraph 34 thereof, pose the question of the Court's jurisdiction in terms that do not faithfully reflect the Court's liberal approach to the treatment of the application.

[**56.**] 10. In the foregoing two paragraphs of the judgment, the question of the Court's jurisdiction is indeed posed by the exclusive reference to article 5(3) and article 34(6) of the Protocol. However, article 5 essentially deals with the question of 'Access to the Court' as the title clearly indicates. Thus, the question of the personal jurisdiction of the Court in this case cannot but receive the response set forth in paragraph 37 of the Judgment, ie, that since Senegal has not made the declaration provided for in article 34(6) of the Protocol, the Court has no jurisdiction to hear cases instituted directly against this state by individuals. This ruling could have been made expeditiously in terms of the preliminary consideration of the Court's jurisdiction as provided for in rule 39 of the Rules.

[**57.**] 11. Though of fundamental importance to the question of the personal jurisdiction of the Court, article 5(3) and article 34(6) of the Protocol should be read in their context, ie in particular in light of article 3 of the Protocol entitled 'Jurisdiction' of the Court.

[**58.**] 12. Indeed, although the two are closely related, the issues of the Court's 'jurisdiction' and of 'access' to the Court are no less distinct, as paragraph 39 of the Judgment in fact suggests; it is precisely this distinction that explains why the Court did not reject *de plano* the application given the manifest lack of jurisdiction, by means of a simple letter issued by the Registry, and why it took time to rule on the application by means of a very solemn judgment.

[**59.**] 13. The application was received at the Court Registry on 29 December 2008 and it was placed on the general list as no 001/2008. The application was served on Senegal on 5 January 2009; and on the same day, the Chairperson of the African Union Commission was informed about the filing of the application and through him the Executive Council and the other parties to the Protocol.

[**60.**] 14. Thus, upon submission, the application was subject to a number of procedural acts including its registration on the general list of the Court and its service on Senegal.

[**61.**] 15. For their part, applications or communications addressed to the African Commission on Human and Peoples' Rights, the defunct European Commission of Human Rights, the Inter-American Commission of Human Rights, the United Nations Human Rights Committee or the International Court of Justice, for example, undergo a process of vetting prior to being registered or served on the states against which they were instituted.

[**62.**] 16. In this case, the application did not go through this initial procedural phase of vetting. It was treated in the same way as the

applications brought before the International Court of Justice before 1 July 1978, date of entry into force of its new Rules. Prior to that date, all cases brought before the Court, including those instituted against states that had not previously accepted the Court's jurisdiction by making the optional declaration accepting the compulsory jurisdiction provided for in article 36(2) of the Statute, were indeed placed on the general list and served on the states against which they were instituted, and on the United Nations Secretary General and, through him, on all the other members of the organisation.

[**63.**] 17. As indicated in the foregoing paragraph 13, procedural acts similar to the aforesaid were undertaken in connection with Mr Yogogombaye's application; this was, *inter alia*, served on Senegal under covering letter dated 5 January 2009.

[**64.**] 18. Senegal acknowledged receipt thereof by letter dated 10 February 2009 in which it also transmitted the names of those to represent it before the Court. At that stage, Senegal could have limited itself to indicating that it had not made the declaration provided for in article 34(6) of the Protocol and that, consequently, the Court had no jurisdiction to deal with the application on the grounds of the provisions of Article 5(3) of the Protocol. However, by notifying the Court of the names of its representatives, it gave room for the suggestion that it did not exclude appearing before the Court and of participating in its proceedings, with doubts as to the object of its participation: to contest the Court's jurisdiction, contest the admissibility of the application or to defend itself on the merits of the case.

[**65.**] 19. By second letter dated 17 February 2009, Senegal requested the Court to extend the time limit for submission of its observations to 'enable it to better prepare a reply to the application'. By so doing, Senegal signaled its intention to comply with the provisions of Rule 37 of the Rules according to which 'the State Party against which an application has been filed shall respond thereto within sixty (60) days provided that the Court may, if the need arises, grant an extension of time'. Even in this letter, Senegal did not exclude the eventual acceptance of the Court's jurisdiction. Still at this stage, it could have put up the argument that it has not made the declaration provided for in article 34(6) of the Protocol and, on that ground, contested the jurisdiction of the Court.

[**66.**] 20. Even though it would not have made the aforementioned declaration, Senegal, by its attitude, left open the possibility, however slim, that it might accept the jurisdiction of the Court to deal with the application.

[**67.**] 21. The fundamental principle regarding the acceptance of the jurisdiction of an international court is indeed that of consent, a

principle which itself is derived from that of the sovereignty of the state. A state's consent is the condition sine qua non for the jurisdiction of any international Court, irrespective of the moment or the way the consent is expressed.

[**68.**] 22. This principle of jurisdiction by consent is also upheld by the Protocol. Thus, in contentious matters, the Court can exercise jurisdiction only in respect of the states parties to the Protocol. The scope of the Court's jurisdiction in such cases and the modalities of access thereto are defined in articles 3 and 5, respectively, of the Protocol.

[**69.**] 23. By becoming parties to the Protocol, member states of the African Union *ipso facto* accept the jurisdiction of the Court to entertain applications from other states parties, the African Commission or African inter-governmental organisations. The jurisdiction of the Court in respect of applications from individuals or non-governmental organizations against states parties is not, for its part, automatic; it depends on the optional expression of consent by the states concerned.

[**70.**] 24. This is provided for in article 34(6) of the Protocol which states that:

> At the time of ratification of this Protocol or any time thereafter, the state shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

As it is drafted, this provision raises two questions:

[**71.**] 25. The first is the meaning to give to the word 'shall' used in the first sentence which suggests that filing of the declaration by the state party is an 'obligation' for the state party and not simply 'a matter of choice'.

[**72.**] 26. Understood in this way, article 34(6) would make it obligatory for state parties to make such a declaration after depositing their instruments of ratification (or accession). This prescription does not however have any real legal effect because it does not set any time limit. It also does not make much sense when read in light of its context and particularly of article 5(3) and the second sentence of 34(6) which states that 'The Court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration'. It can thus be said in conclusion that the filing of the declaration is optional; this conclusion is corroborated by an analysis of the '*travaux préparatoires*' of the Protocol.

[**73.**] 27. The second question raised in article 34(6) is that of whether the filing of the optional declaration by states parties is the only means of expressing their recognition of the jurisdiction of the Court to deal with applications brought against them by individuals.

[**74.**] 28. In this regard, it should first be noted that article 34(6) does not require that the filing of the optional declaration be done 'before' the filing of the application; it simply provides that the declaration may be made 'at the time of ratification or any time thereafter'. Nothing therefore prevents a state party from making the declaration 'after' an application has been introduced against it. In accordance with article 34(4) of the Protocol, the declaration, just as ratification or accession, enters into force from the time of submission and takes effect from this date. Senegal was therefore free to make such a declaration after the application was introduced.

[**75.**] 29. If a state can accept the jurisdiction of the Court by filing an optional declaration 'at any time', nothing in the Protocol prevents it from granting its consent, after the introduction of the application, in a manner other than through the optional declaration.

[**76.**] 30. Therefore, the second sentence of article 34(6) must not, as the first sentence, be interpreted literally. It must be read in light of the purposes and goals of the Protocol and, in particular, in light of article 3 entitled 'Jurisdiction' of the Court. Indeed, article 3 provides in general manner that: 'the jurisdiction of the Court shall extend to all cases and disputes submitted to it'; it also provides that 'in the event of dispute as to whether the Court has jurisdiction, the Court shall decide'. It therefore lies with the Court to determine in all sovereignty the conditions for the validity of its seizure; and do so only in the light of the principle of consent.

[**77.**] 31. Consent by a state party is the only condition for the Court to exercise jurisdiction with regard to applications brought by individuals. This consent may be expressed before the filing of an application against the state party, with the submission of the declaration mentioned in article 34(6) of the Protocol. It may also be expressed later, either formally through the filing of such a declaration, or informally or implicitly through *forum prorogatum*.

[**78.**] 32. *Forum prorogatum* or 'prorogation of competence' may be understood as the acceptance of the jurisdiction of an international court by a state after the seizure of this Court by another state or an individual, expressly or tacitly through decisive acts or an unequivocal behaviour. It was in particular this possibility that the letters issued by Senegal dated 10 and 17 of February 2009 led the Court to foresee in this case.

[**79.**] 33. Up to 9 April 2009, the date on which the Registry received the written observations of Senegal, there was the possibility that Senegal might accept the jurisdiction of the Court. It was only on this date that it became unequivocally clear that Senegal had no intention of accepting the Court's jurisdiction to deal with the application.

[**80.**] 34. It was therefore up to the Court to take into account Senegal's refusal to consent to the jurisdiction of the Court to deal

with the application and to draw the consequences thereof by putting an end to the matter and removing the case from the general list.

[**81.**] 35. Under the former Rules of the International Court of Justice (before 1 July 1978), when a case was brought against a state which has not previously accepted the jurisdiction of the Court by filing the optional declaration and such a state did not accept the Court's jurisdiction in regard to the case after having been invited to do so by the applicant state, such a case was closed by the issuance of a succinct order. In the European Court of Human Rights where the problem of jurisdiction occurs less frequently than that of admissibility of applications, when there is no serious doubt as to the inadmissibility of an application, the corresponding decision is notified to the applicant through a simple letter.

[**82.**] 36. In the present case, Senegal having formally raised preliminary objections in its 'statement of defence' dated 9 April 2009, the Court deemed it necessary to comply with the provisions of rule 52(7) of its Rules which stipulates that 'The Court shall give reasons for its ruling on the preliminary objection'.

[**83.**] 37. However, consideration by the Court of Senegal's preliminary objections required that it addresses the question of it's jurisdiction in a more comprehensive manner by developing in particular the possibility of a *forum prorogatum*. This possibility is all the more suggested in paragraph 37 of the judgment where the Court, on the grounds of its ruling that Senegal has not made the optional declaration, concluded that the said state, on that basis, 'has not accepted the jurisdiction of the Court to hear cases instituted directly against this state by individuals or non governmental organisations'.

[**84.**] 38. Nevertheless, it is this possibility of a *forum prorogatum*, however slight, that explains why the application of Mr Yogogombaye was not rejected right after 10 February 2009; and it is the filing of preliminary objections by Senegal which explains why the Court did not close the case in a less solemn manner by issuing an order or by simple letter by the Registry.

[**85.**] 39. The submission of preliminary objections by Senegal may, in turn, be explained by scrupulous compliance by this state with the provisions of rule 37 and 52(1) of the Rules.

[**86.**] 40. Today, the question is whether 'all' applications filed with the Registry should be placed on the Court's general list, notified to the states against which they are directed, and above all, as provided for under article 35(3) of the Rules, notified to the Chairperson of the African Union Commission and, through him, to the Executive Council of the Union, as well as to all the other states parties to the Protocol. As a judicial organ, once the Court receives an application, it has the obligation to ensure, at least in a *prima facie* manner, that it has

jurisdiction in the matter. Certainly, here lies the object of preliminary consideration by the Court of its jurisdiction as provided for in rule 39 of its Rules. A selection should then be made between individual applications in respect of which, at a glance, the Court has jurisdiction and those in respect of which it has not, which is the case when the state party concerned has not made the optional declaration. In this latter hypothesis, the application should be rejected *de plano* by simple letter by the Registry. It could eventually be communicated to the state party concerned, but it is only if such a state accepts the jurisdiction of the Court that the application could be placed on the Court's general list and notified to the other states parties. The idea is to avoid giving untimely or undue publicity to individual applications in respect of which the Court clearly lacks jurisdiction.

[**87.**] 41. In this regard, it is important to point out that the potential authors of individual applications can in the present circumstances experience difficulties knowing the situation of an African state vis-à-vis the optional declaration. Indeed, only the list of the states parties to the Protocol is being published on the African Union Commission website and this list does not mention the states that have made the optional declaration. It would therefore be desirable that the list of the states that have made the said declaration be similarly published on the website for the purposes of bringing the information to the knowledge of individuals and non governmental organisations.

[**88.**] 42. The Court, for its part, cannot be satisfied with such publication as it does not have official value, and is not a 'real time' reflection of the status of participation in the Protocol and in the system of the optional declaration. To date, the list of states parties to the Protocol and that of the states parties that have made the optional declaration, while being of primary interest to the Court, are not automatically notified to the Court by the Chairperson of the African Union Commission, depository of the Protocol. The Protocol does not oblige the depository to communicate declarations to the Court Registry, its article 34(7) contenting itself with providing that declarations should be deposited with the Chairperson of the African Union Commission 'who shall transmit copies thereof to the state parties'. The Statute of the International Court of Justice and the American Convention of Human Rights, for their part, provide that the depositories of the optional declarations accepting the compulsory jurisdiction of the International Court of Justice and the Inter-American Court, respectively, should file copies thereof in the registries of the said courts. Although the relevant department of the African Union Commission is not legally bound to do so, it would also be desirable that in future the said department inform the Court of any update of the two above-mentioned lists.

SUB-REGIONAL COURTS

ECOWAS COMMUNITY COURT OF JUSTICE

Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Nigeria

(2009) AHRLR 331 (ECOWAS 2009)

Registered Trustees of the Socio-Economic Rights & Accountability Project (SERAP) v Federal Republic of Nigeria

Community Court of Justice of the Economic Community of West African States (ECOWAS), suit ECW/CCJ/APP/0808, judgment 27 October 2009

Judges: Donli, Benin, Sidibe

Ruling on preliminary objection in case dealing with the right to education

Jurisdiction (human rights, 11-13)
Locus standi (*actio popularis*, 20-23, 31-34)
Socio-economic rights (justiciability, 19)

1. Plaintiff is a human rights non-governmental organization registered under the laws of the Federal Republic of Nigeria whilst the first defendant is a member state of the Economic Community of West African States and the second defendant is the Commission on Universal Basic Education established by the first defendant.

2. The plaintiff filed an application against the defendants alleging the violation of the right to quality education, the right to dignity, the right of peoples to their wealth and natural resources and the right of peoples to economic and social development guaranteed by articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights

3. Before the court could go into the merits of the application, the second defendant filed a motion alleging that this court lacks jurisdiction to entertain the action filed by the plaintiff. They objected to the jurisdiction of the court on the following grounds:

(a) That the jurisdiction of the court is limited to the provisions of article 9 of the Supplementary Protocol and that the court lacks jurisdiction to determine the subject matter of the suit

(b) That the Compulsory and Basic Education Act 2004 and the Child's Rights Act 2004 are municipal laws of Nigeria and not subject to the jurisdiction of the court because it is not a treaty, convention or protocol of ECOWAS

(c) That the educational objective of the Federal Republic of Nigeria is provided for under section 18(1)(2) and (3) of Chapter II of the 1999 Constitution and is non justiciable or enforceable and cannot be determined by the court

(d) That the plaintiff has no *locus standi* to institute or maintain this action against the second defendant

In considering the preliminary objection raised by the second defendant, grounds two and three thereof would be considered together, as both arise from the Constitution as well as the domestic laws of the Federal Republic of Nigeria, as against the Treaty and Protocols of ECOWAS.

Issue 1: Whether the court has jurisdiction to adjudicate on the application filed by the plaintiff

4. Second defendant contends that under article 9 of the Supplementary Protocol the Court does not have the competence to adjudicate on the subject matters outside a treaty, convention or protocol of the Community. They contend that the issues complained of by the plaintiff are grounded in the municipal law of the Federal Republic, a matter which the Court has no jurisdiction over. They relied on paragraph 1(a), (b) and (c) of article 9 of the Supplementary Protocol on the court to conclude that this court lacks subject matter jurisdiction over the suit filed by the plaintiff

5. Second defendant continues that this Court has not the competence to adjudicate on the claim as filed by the plaintiff because this court lacks the subject-matter jurisdiction to do so. Second defendant relied on the provisions of article 9(1)(a), (b) and (c) to conclude that this court lacks subject matter jurisdiction in the present suit. Article 9(1)(a), (b) and (c) stipulates thus:

(1) The court has the competence to adjudicate on any dispute relating to the following (a) The interpretation and application of the treaty, convention and protocol of the community; (b) The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (c) The legality of regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS

6. Second defendant concluded that from the above provisions of the Supplementary Protocol, the jurisdiction of this Court is limited to the interpretation, application, legality or implementation of treaties, conventions or protocols of ECOWAS

7. In response to the above submissions by second defendant, plaintiff stated that the suit is not based solely on the domestic

legislation of the Federal Republic of Nigeria, to wit, the Compulsory and Basic Education Act and the Child's Right Act but also on legally enforceable international and regional human rights treaties, such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. Plaintiff contended that Nigeria has a duty to fully implement its international human rights obligations, and to make necessary legislations to implement them. Plaintiff also averred that this Court is statutorily empowered to hear the cases of violations of human rights.

8. Plaintiff argued that the position canvassed by the second defendant is fundamentally flawed as the issues raised by the plaintiff in his application are based not only on the domestic laws of Nigeria but on international human rights instruments over which the Court clearly has jurisdiction. Plaintiff further states that the court is statutorily empowered to hear cases of violations of human rights, even if such cases rely in part on national laws.

9. It is a well established principle of law that jurisdiction is a creature of statute. The statute that spells out the jurisdiction of this Court is the Supplementary Protocol on the Court of Justice, specifically article 9 thereof. For this court to have subject-matter jurisdiction over the suit as instituted by the plaintiff, the subject matter of the suit must fall within the confines of article 9 of the Supplementary Protocol to the court.

10. The subject matter of the application filed by the plaintiff respondent in the instant proceedings is the violation of the right to education and human dignity. They further alleged a violation of the right of the peoples to their wealth and natural resources as well as the right of peoples to economic and social development. They claim these rights are guaranteed by articles 1, 2, 17, 21, and 22 of the African Charter on Human and Peoples' Rights

11. Article 9 of the Supplementary Protocol which governs the jurisdiction of this court has eight sub-sections, which grant the Court jurisdiction on several different issues. Second defendants relied on the provisions of article 9(1)(a), (b) and (c) to conclude that the court lacks jurisdiction as those sub-sections of article 9 only govern issues relating to the application and interpretation of ECOWAS texts. However, article 9 has several other subsections which grant other forms of jurisdiction to the court.

12. Under article 9(4) of the Supplementary Protocol, the Court clearly has jurisdiction to adjudicate on applications concerning the violation of human rights that occur in member states of ECOWAS. Article 9(4) stipulates in part that: 'The court has jurisdiction to determine cases of violation of human rights that occur in any member state.'

13. The thrust of the plaintiff's suit is the denial of the right to education for the people of the Federal Republic of Nigeria, denial of the right of people to their wealth and natural resources and the right of people to economic and social developments guaranteed by articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights of which Nigeria is a signatory. The court has jurisdiction over human rights enshrined in the African Charter and the fact that these rights are domesticated in the municipal law of the Federal Republic of Nigeria cannot oust the jurisdiction of the court. Second defendant's reliance on article 9(1)(a), (b) and (c) of the Supplementary Protocol of the Court to argue that the court does not have subject-matter jurisdiction over human rights issues is misconceived as they failed to take cognizance of the entire provisions of article 9. In law, an enactment must be read as a whole. This court clearly has subject matter jurisdiction over human rights violations in so far as these are recognized by the African Charter on Human and Peoples' Rights, which is adopted by article 4(g) of the Revised Treaty of ECOWAS. As the plaintiff's claim is premised on articles 1, 2, 17, 21 and 22 of the African Charter on Human and Peoples' Rights, the Court does have subject matter jurisdiction of the suit filed by the plaintiff.

Issue 2: Whether the right to education is justiciable and can be litigated before this court

14. Second defendant applicant contends that the educational objective of the first defendant, the Federal Republic of Nigeria, contained in Chapter II of the 1999 Constitution of the Federal Republic lies at the heart of the plaintiff's suit. Second defendant contends that the provisions of Chapter II of the 1999 Constitution are the directive principles of state policy and are therefore not justiciable. They postulate that the principles of state policy represent the ideals which the Federal Government ought to strive to achieve and do not confer any positive rights on any citizen. They stated further that the Federal Government of Nigeria has absolute powers over educational matters and that by section 6(6)(c) of the constitution, jurisdiction over such issues is reserved exclusively for the Federal High Court. Again, second defendant stated that though the constitution has imposed a duty on all the three organs of government to strive to eradicate illiteracy and to provide free compulsory basic education, these are just educational policies which are non-justiciable. In short, the second defendant contends that the subject matter of the suit is covered by the provisions of the Nigerian constitution on the directive principles of state policy and cannot be determined or enforced by this court.

15. In response, the plaintiff contends that the second defendant's argument on the non-justiciability and non-enforceability of the right to education before this court is misconceived. They stated that the

right to education is recognised by the African Charter on Human and Peoples' Rights and the International Covenant on Economic, Social and Cultural Rights as legally enforceable human right have been ratified by Nigeria and must be enforced as such. Finally, plaintiff contends that the fundamental objectives and directive principles of state policy in the Nigerian Constitution contain norms which are internationally recognised as enforceable social and economic rights.

16. It is important to assess the basis of the plaintiff's claims in determining the justiciability or otherwise of his claims with respect to the right to education and whether it can be litigated before this court. Whilst second defendant contends that the right to education is one of the fundamental principles of state policy enshrined in the 1999 Constitution of the Federal Republic of Nigeria and is therefore unenforceable, plaintiff contends that the right to education is one that is internationally recognised as enforceable. Plaintiff in instituting the present action relied primarily on the International Covenant on Economic, Social and Cultural Rights as well as the African Charter on Human and Peoples' Rights to allege that there is a right to education which has been breached. Though they factually based their claim on the Compulsory and Basic Education Act and the Child's Right Act of the Federal Republic of Nigeria, they alleged a breach of the right to education contrary to article 17 of the African Charter on Human and Peoples' Rights and not a breach of the right to education contained under section II of the 1999 Federal Constitution of Nigeria

17. The directive principles of state policy of the Federal Republic of Nigeria are not justiciable before this court as argued by second defendant and the fact was not contested by the plaintiff. And granted that the provisions under the directive principles of state policy were justiciable, it would be the exclusive jurisdiction of the Federal High Court, being a matter solely within the domestic jurisdiction of the Federal Republic of Nigeria. However, plaintiff alleges a breach of the right to education contrary to the provisions of the African Charter on Human and Peoples' Rights. The right to education recognized under article 17 of the African Charter on Human and Peoples' Rights and not a breach of the right to education contained under section II of the 1999 Federal Constitution of Nigeria.

18. It is essential to note that most human rights provisions are contained in domestic legislations as well as international human rights instruments. Some of the fundamental human rights, such as the right to life, have even been elevated to the status of *ius cogens*, peremptory norms of international law from which no derogation is permitted. Hence the existence of a right in one jurisdiction does not automatically oust its enforcement in the other. They are independent of each other. Under article 4(g) of the Revised Treaty of ECOWAS, member states of ECOWAS, affirmed and declared their

adherence to the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights. The first defendant is a signatory to the African Charter on Human and Peoples' Rights and re-enacted it as laws of the Federal Republic of Nigeria to assert its commitment to same. The first defendant is also signatory to the Revised Treaty of ECOWAS and is therefore bound by their provisions.

19. It is trite law that this court is empowered to apply the provisions of the African Charter on Human and Peoples' Rights and article 17 thereof guarantees the right to education. It is well established that the rights guaranteed by the African Charter on Human and Peoples' Rights are justiciable before this court. Therefore, since the plaintiff's application was in pursuance of a right guaranteed by the provisions of the African Charter, the contention of second defendant that the right to education is not justiciable as it falls within the directive principles of state policy cannot hold.

Issue 3: Whether the plaintiff lacks *locus standi* to initiate or maintain this action

20. The second defendant herein contends that the plaintiff lacks the requisite *locus standi* to initiate the present proceedings because the plaintiff has failed to show that it has suffered any damage, loss or personal injury in respect of the acts alleged in the suit. They contend that the plaintiff has no right, interest or obligation that can give them the right to maintain this action; or alternatively that the plaintiff does not have a sufficient or special interest in the performance of the duty sought to be enforced by the institution of this action. Therefore, second defendant urges the court to strike out plaintiff's action for lack of the necessary *locus standi*

21. Plaintiff, in its reply to the preliminary objection, contends that the second defendant's argument with respect to *locus standi* is based on the restrictive and outdated interpretation of standing, especially in human rights matters. They contend that the modern trend in most national and international jurisprudence is to embrace a more flexible and progressive interpretation of the doctrine of standing, especially in human rights causes. They contend further that with the flexible approach in the interpretation of the doctrine of standing, any citizen is allowed to challenge a breach of a public right in court. Plaintiff outlined a number of cases in which the sufficient interest or injury test in the determination of standing was rejected in order to buttress their point. Plaintiff concluded that since the right they are seeking to enforce is a public right, they have the requisite standing to maintain the action.

22. Second defendant relied on a number of decisions from the Supreme Court of the Federal Republic of Nigeria to support their argument that a plaintiff cannot sustain an action unless he has

personally suffered some injury or has shown that he has a special interest which must be protected; in the absence of that a plaintiff has no justiciable ground to invoke the jurisdiction of a court. The second defendant relied on the case of *Adesanya v President Of Nigeria* (1981) NSCC VOL 12 14 at 147 where the Supreme Court of the Federal Republic of Nigeria stated that 'What constitute a fact of *locus standi* is the exercise of a right or interest that is 'worthy of protection' by judicial discretion; the matter must attach to a right and obligation.'

23. Second defendant also relied on the case of *Ajagungbade III v Adeyelu* (2000) 9 WRN 92 at 99 where the court stated in part that 'there are two tests in determining the *locus standi* of a person namely: (a) The action must be justiciable and (b) there must be a dispute between the parties.'

24. Further, second defendant sought to buttress their point with the decision in the case of *AG Kaduna State v Hassan* (1985) 2 NWLR (Pt 7) 483, where the Supreme Court of Nigeria stated inter alia that:

> The law is that when a party's standing to sue is in issue in a case, the question is whether the person whose standing is in issue is a proper person to request an adjudication of an issue and not whether the issue itself is justiciable. The question is whether or not a claimant has sufficient justiciable interest or sufferance of injury or damage depends on the facts and circumstances of each case.

25. Second defendant also used cases such as *Awehimi v Akilu* (1987) 11-12 SCNJ 151 at 200; *Okoye v Lagos State Government* (1990) 2 NWLR (Pt 136) 115; *Elendu v Ekoaba* (1995) 3 NWLR 386, *Adefulu v Oyesile* (1995) 5 NWLR (Pt 122) 577 and others to support their contention that for a party to have standing that the party must have suffered some harm or prove to have some special interest which is worthy of protection. These cases clearly support the view put forward by the second defendant that a party must have suffered injury or have some special interest that warrants a judicial protection before that party would be clothed with *locus standi* to initiate and sustain a claim in respect of that matter.

26. The plaintiff, on the other hand, produced a list of judicial decisions, both under domestic and international jurisdictions to augment their claim that there is a shift from a restrictive to a flexible approach to standing in cases of human rights violations and therefore a plaintiff need not establish that he has suffered injury or has a special right in order to have standing. Instead plaintiff has to show that the right alleged to have been breached is public in nature and that the matter is justiciable.

27. Plaintiff relied on the case of *Fertilizer Corporation Kamager Union v Union of India* (1981) AIR (SC) 344 where it was stated:

> Restrictive rules about standing are in general inimical to a healthy system of growth of administrative law. If a plaintiff with a good cause is turned away merely because he is not sufficiently affected personally

> that could mean that some government agency is left free to violate the law. Such a situation would be extremely unhealthy and contrary to the public interest. Litigants are unlikely to spend their time and money unless they have some real interest at stake and in some cases where they wish to sue merely out of public spirit, to discourage them and thwart their good intentions would be most frustrating and completely demoralizing.

28. Plaintiff also relied in an observation in the case of *Abraham Adesanya v President of the Federal Republic of Nigeria* (1981) 1 ALL NLR 1 at 20, to bolster their argument wherein Fatayi-Williams CJN said thus:

> I take significant cognizance of the fact that Nigeria is a developing country with multi-ethnic society and a written Federal constitution, where rumour-mongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes or is led to believe that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our legislative Houses, where Federal or State, is unconstitutional, access to a court of law to hear his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process. In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the free-for-all in the media as to which law is constitutional and which law is not! In any case our courts have inherent powers to deal with vexatious litigants or frivolous claims.

29. Plaintiff relied on other decisions, including *Attorney-General of Bendel State v Attorney-General of the Federation* (1982) 2 NCLR 1; *British American Tobacco v Envoronmental Action Network LTD* (2003) 2 EA 377; *Benazir Butto v Federation of Pakistan PLD* (1998) SC 416; *Kazi Mukhlesur v Bangladesh* 26 DLR (SC) 44; *NAACP v Button* 371 US 415 (1963); *The Society for the Protection of Unborn Children (Ireland) LTD v Coogan* (1989) IR 734, to support their stance that in public interest litigation, the plaintiff need not prove that he has personally suffered injury or that he has a special interest that has to be protected judicially.

30. The authorities citied by both second defendant and plaintiff support the viewpoints canvassed by them. However, we think that the arguments presented by the plaintiff are more persuasive for the following reasons.

31. The doctrine *actio popularis* was developed under Roman law in order to allow any citizen to challenge a breach of public right in court. This doctrine developed as a way of ensuring that the restrictive approach to the issue of standing would not prevent public spirited individuals from challenging a breach of a public right in court.

32. Plaintiff citied authorities from around the globe to support the position that in human rights litigation, every spirited individual is allowed to challenge a breach of public right. Decisions were cited from the United States, Ireland, Bangladesh, Pakistan, India, the United Kingdom and other jurisdictions which all concur in the view

that the plaintiff in a human rights violation cause need not be personally affected or have any special interest worthy of protection.

33. A close look at the reasons above and public international law in general, which is by and large in favour of promoting human rights and limiting the impediments against such a promotion, lends credence to the view that in public interest litigation, the plaintiff need not show that he has suffered any personal injury or has a special interest that needs to be protected to have standing. Plaintiff must establish that there is a public right which is worthy of protection which has been allegedly breached and that the matter in question is justiciable. This is a healthy development in the promotion of human rights and this court must lend its weight to it, in order to satisfy the aspirations of citizens of the sub-region in their quest for a pervasive human rights regime.

Decision on the preliminary objection

(a) Whereas the second defendant filed a preliminary objection that the suit is not justiciable and that the plaintiff had no *locus standi* to bring the action before this court;

(b) Whereas the respondent/plaintiff argued that court has jurisdiction to hear the case on all the issues in relief sought;

(c) Whereas the court having deliberated on the application and the issues therein together with the response by the plaintiff;

(d) Whereas the Court is satisfied that at this stage *prima facie* facts have emerged in support of the case that the plaintiff has proper standing to bring the action that the matter is justiciable in this Court.

Orders

This Court hereby orders that for the foregoing reasons the preliminary objection is overruled and refused.

Costs

The application having been refused, cost shall be within costs and in favour of the plaintiff against the second defendant.

DOMESTIC DECISIONS

GHANA

Asare and Others v GA West District Assembly and Another

(2009) AHRLR 343 (GhHC 2009)

Emmanuel Victor Asare & 3 Others v GA West District Assembly & Another

High Court of Ghana at Accra, Suit AP 36/2007, 2 May 2008.

Judge: Ofori Atta

Evictions and demolition of property

Life (right to livelihood, 13, 14)
Property (evictions,12, 18-19)
Remedies (compensation, 28)

[**1.**] The Greater Accra Region is generally low lying and some areas are flood prone during the rainy season. One of such areas is known as Mallam, towards the western side of the Accra Metropolis. It is located in the GA West District of the Region.

[**2.**] In July 2007 following heavy rains, some lives and property were lost as a result of the floods in the area. The public outcry was deafening. The district authorities maintain that the floods were the direct result of or contributed to by the houses and structures built or erected across water courses in the area by the residents including the applicants herein. By their bye-laws, the developments were illegal.

[**3.**] The District Assembly was nudged into taking concrete and urgent action to prevent a recurrence. It mobilized security personnel and commenced demolishing the offending structures and forcibly evicted some of the residents from their homes.

[**4.**] The residents' claim that the demolition and evictions constitute violations of their fundamental human rights to life and property among others and have brought the instant action against the District Assembly and the Attorney-General for:

> Enforcement of fundamental human rights and for an order of prohibition restraining the defendants, their workers, agents and servants from forcibly demolishing the houses of the applicants and/or for an order for the payment of compensation to the residents whose

houses have been unlawfully demolished and for such orders as this Honourable may deem fit.

[**5.**] The application has been brought under article 33(1) of the 1992 Constitution. It provides:

> Where a person alleges that a provision of this constitution on the fundamental human rights and freedoms has been or is being or is likely to be contravened in relation to him, then without prejudice to any other action that is lawfully available, that person may apply to the High Court for redress.

Thus the High Court has been given power to enforce the rights of persons who allege that any of their rights as provided for in chapter five of the 1992 Constitution have been, are being or, are likely to be violated or contravened. Among them are the rights to life, liberty, human dignity, fair trial, and protection from deprivation of property. Detailed provisions have also been made for property rights of spouses, economic, educational culture rights and women and children's rights among others.

[**6.**] The procedure for bringing actions for the enforcement of the fundamental human rights under article 33 of the Constitution has been provided for under order 67 of the High Court [Civil Procedure] Rules CI 47, 2004. By rule 1 of the order, a person who seeks in respect of the enforcement of any fundamental human right in relation to that person under article 33(1) of the Constitution shall submit an application to the High Court. Human rights issues are urgent and important and the rules provide for a quick and convenient disposal of same by the courts.

[**7.**] The respective affidavits and statements of case filed by the parties and their counsel disclose that the facts as stated above are not seriously in dispute.

[**8.**] It is the case of the applicants that they were granted their plots by the Gbawe Kwatei family, owners of the land between 1967 and 1991. Some of the leases were exhibited. It is also averred that applicants have built their houses and have been living in them for several years. The defendants counter these allegations and urge that the houses and structures are illegal in that they are within waterways and water reservations and they are not supposed to be there in the first place. It is further intended that this fact was known to the residents yet they ignored it and went ahead to erect their structures. Therefore the first defendants are entitled by law to remove them to make way for the free flow of water in order to reduce if not wholly eliminate the perennial flooding of the area without its attendant loss of lives and property. From the evidence on record, the applicants do not deny that their structures or some of them are on waterways and within water reservation and I so hold.

[**9.**] Another issue raised by the applicants is that upon acquiring their leases, some of them had permission from the first defendant to build their respective houses and had also been paying all necessary

rates to the appropriate authorities. To the contrary the defendants aver that the applicants have no valid building permits. In paragraphs 12 of the affidavit in opposition by the first defendant it is deposed that: 'The building permits which are bandied about as genuine permits were paid for by cash and did not go through the proper process.' On the part of the second defendant, it is alleged that some of the permits are irregular and were not issued by the appropriate officers.

[**10.**] From the affidavit evidence, I have come to the conclusion that it is not all the houses which have building permits. It is also not in doubt that some of the building permits were not issued by the appropriate officials. On this point, I agree with learned counsel for the applicants that they are entitled to assume the regularity of the permits issued them. In this case, the permits were issued as part of the official duties of the officers concerned and the law is that official duty is presumed to have been regularly performed. Section 37 of the Evidence Decree 1975 [NRCD 323] provides: 'It is presumed that official duty has been regularly performed.' The section falls within the rebuttable presumptions under the law. In this instance, the permits were issued by agents of the first defendants. And the objection to the permits is that they were issued by the District Works Engineer and not the Senior Architects or Building Inspectors. For my part in the absence of clear evidence that the applicants or those who had the permits knew of the irregularity the presumption of the permits having been issued regularly by the officials concerned has not been displaced. I accordingly hold that the building permits were regularly obtained.

[**11.**] I also find in the evidence that some of the applicants paid property and other rates to the first defendant which payments were accepted and receipts issued for them.

[**12.**] It is in the light of the foregoing that the applicants contend that the demolition of their properties and forced evictions contribute a breach of their rights to life, and livelihood, human dignity, property and a right not to be evicted without due process. They also pray for compensation for the demolished properties. Article 13 (1) of our 1992 Constitution reads:

> No person shall be deprived of his life intentionally except in the exercise of the execution of a sentence of a court in respect of a criminal offence under the laws of Ghana of which he has been convicted.

My understanding of the sub-clause is that nobody's life can be taken intentionally without due process of law. Sub-clause (2) of the article provides for exceptions to sub-clause (1). It provides that:

> a person shall not be held to have deprived another person of his life contrary to clause 1 if that other person dies as a result of the use of reasonably justifiable force in the following circumstances: (i) Self-defence or defence of ... property; (ii) the lawful arrest of a person of the prevention of the escape of a person lawfully detained, or (iii)

> Suppression of a riot, insurrection or meeting, or (iv) to prevent the commission of a crime by that person.

The above exceptions show that the right to life is not absolute.

[**13.**] It has been urged in learned counsel for the applicants' written arguments that the right to life should be given a broad meaning to cover the quantum and quality of a persons life and refers to the case of *Olga Tellis v Bombay Municipal Corporation* (1985) wherein the Supreme Court of India held that the right to life includes the right to livelihood. The Court said:

> The sweep of the right to life conferred by article 21 [of the Constitution of India] is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as for example, by the imposition and execution of the death sentence except according to procedure established by law. That is but one aspect of that right to life. An equally important facet of that right is the right to livelihood, because no person can live without the means of living; that is the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood.

Again, learned counsel refers to the case of *Francis Coralie Mullin v Administrator, Union Territory of Delhi* [1981] 2 SCR 516 in which the Supreme Court of India again held that:

> The right to life includes the right to live with human dignity and all that goes with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading writing and expressing oneself in diverse forms freely moving about and inviting and commingling with fellow human beings.

In the above cases, the Supreme Court of India adopted a broad interpretation of the right to life to include all conditions that make life worth living and I am indeed persuaded by the opinions, although in Ghana there are specific provisions enshrined in the constitution on the right to education, movement, association etc, in addition to the right to life. Flowing from the above, it has been urged that the demolition and forced evictions during the rainy season and the failure to provide alternative accommodation and or compensation constitute a violation of the applicants right to life not only under our constitution but also as enshrined in international charters to which Ghana is a signatory.

[**14.**] One such charter is the African Charter on Human and Peoples' Rights, article 4 of which states:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

The African Commission on Human and Peoples' Rights have in rulings on the above article, made pronouncements that seem to agree with the views of the Supreme Court of India in the cases cited above. In *Kazeem Aminu v Nigeria* cited in *The law of the African Charter on Human and Peoples' Rights* (2007) by Hassan B Jallow at page 188, there was a complaint of harassment by security officers leading to

the victim going into hiding for fear of his life. The Commission ruled as follows:

> It would be a narrow interpretation to [the right to life] to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect this life and the dignity of his person would be protected in a state of constant fear and or threats, as experienced by the victim. The Commission therefore finds the above acting of the security agents of the respondent state in violation of article 4 of the Charter.

The learned author writes at page 189 of the book that:

> other treatment — torture, cruel punishment etc, harassment — leading to fear for one's life will constitute a violation of the right to life as well. The right therefore is closely related to the rights set out in article 5 relating to respect for dignity, freedom from exploitation, degradation, slavery, torture cruel inhuman or degrading punishment and treatment denial of medical facilities and care etc.

From the above authorities, the right to life is not limited to deprivation of life *per se*. It encompasses all other rights that make the enjoyment of the right complete and meaningful. Any treatment that derogates from the living of a full life constitutes violation of it. Under our 1992 Constitution therefore, the right to life must be read in conjunction with other rights especially the right to human dignity as enshrined in article 15.

[**15.**] From the facts of this case, the demolition of the buildings, and forcible eviction of the residents of some of them with the ever constant threat of further demolitions and evictions would constitute a violation of the applicants right to life unless there are circumstances that make the evictions and demolitions justifiable.

[**16.**] Indeed, it has been strongly urged upon me that the fundamental human rights are not absolute and are under the Constitution 'subject to respect for the rights and freedoms of others and for the public interest', within the meaning of article 12(2). And 'public interest' has been defined by article 295 of the Constitution as including: 'any right or advantage which enures or is intended to the benefit generally of the whole of the people of Ghana'. Flowing from the above it has been submitted by learned counsel for the second respondent that the right to life cannot be read in relation only to the applicants but to the public at large. Another point raised in respect of the above is that the presence of the structures poses a present and eminent danger to lives and property anytime it rained and the area was flooded. Consequently it was in the public interest that the offending structures were removed.

[**17.**] The right to life as enshrined in our constitution is applicable to all Ghanaians. In the present case those who are not living within the water courses and reservation but who are affected by the devastating effects of the floods are also entitled to the enjoyment of the right to life and property. The eviction of the applicants according the respondents is to enable them construct drains to

ensure that the perennial loss of lives and property as a result of the flooding of the area would be reduced if not completely eliminated. In the circumstances of this case, I am of the view that it is in the public interest that such a project be implemented. Consequently I hold that the demolitions of the houses and eviction of the applicants fall within the provisions of article 12(2) of the constitution and were justifiable.

[**18.**] It has also been urged that the demolition of their houses infringe the applicants' right to the protection of their privacy of home and property as enshrined in article 18(1) of the Constitution. The clause provides that: 'Every person has the right to own properly either alone or in association with others.' Learned counsel argues in his written submission that the failure and/or refusal by the first respondent to value the respective buildings of the premises and the forced eviction is a clear interference with the rights of the applicants. Further learned counsel states the demolitions interfere with article 14 of the African Charter on Human and Peoples' Rights. The article provides that:

> The right to properly shall be guaranteed. It may only be encroached upon in the interest of the public need or in the general interest of the community and in accordance with the provision of appropriate laws.

The African Commission on Human and Peoples' Rights has ruled in relation to the sealing of premises that the right: 'necessarily include a right to have access to ones property and the right not to have one's property invaded or encroached upon.' See page 297 of Jallow *supra* at page 287.

[**19.**] On the other hand the second respondents argue that the demolitions do not constitute a violation of the applicants' right to their property. They refer to article 18(2) of the Constitution and article 14 of the African Charter and submit that the houses of the applicants are not in the general interest of the community. Neither are they in accordance with the laws of the land specially the Constitution and the Local Government Act, 1993, Act 462, building regulations and the African Charter and should therefore be demolished.

[**20.**] Competing interests are at play here. The interests of the applicants in the inviolability or alleged inviolability of their property as against the large interest of the public who stand to suffer loss of property and lives should the houses be allowed to remain as they are. I have already in this delivery referred to the article 12(2) of the Constitution to the effect that the enjoyment of the rights and freedoms is subject to the rights and freedoms of others and for the public interest. In the instant case, article 18(2) of the Constitution provides that the right to privacy of home and other property could be interfered with for public safety or economic well being of the country, for the protection of health or morals, the prevention of

disorder or crime or for the protection of the rights or freedoms of others.

[**21.**] Again article 4 of the African Charter makes the enjoyment of the right to property subject to the interest of the public or the general interest of the community in accordance with the provisions of appropriate laws. By the combined effects of articles 12(2), and 18(2) of the Constitution and article 4 of the African Charter, I am left in no doubt that the exercise embarked upon by the respondents is meant to protect lives and properties in the community at Mallam and its environs. I hold that the demolition and evictions do not constitute an interference with the applicants' rights to their property.

[**22.**] The applicants say that no notices were served on them before the demolition and eviction exercises. It is averred in the supporting affidavit for interim injunction that the respondents started marking the applicants' houses for demolition without any prior notices and about three days thereafter the demolitions and evictions commenced.

[**23.**] The respondents deny the above allegations and aver that as far back as 2001 notices were served in the media on all developers in all major waterways including those in Mallam of the planned removal of illegal structures to make way for a major exercise to create concrete drains across the district. It is further averred that on 10 July 2007 the first respondent caused a radio announcement to be made about the impending demolition exercise. Furthermore the respondents allege that notices were posted on several structures in the area seriously affected by earlier floods which caused untold hardship and massive destruction to life and properties.

[**24.**] I have closely studied the processes on record and I am satisfied that the notices required by law that is the Local Government Act 1993, Act 462 were not strictly complied with. By the provisions of sections 46 to 69 of the Act, the notices must be in writing. A radio announcement could only be in addition to and not in substitution for it. The notices are to be given to the owners, occupiers and developers of the premises involved. This is to ensure that the affected persons have adequate notice of the intended exercise and to enable them make alternative arrangements to relocate or mount the necessary defences to protect their interest in the property.

[**25.**] Having held that the demolition and eviction exercises could be carried out in the public interest and also that the notices if any, did not comply with statutory requirements the following orders are hereby made:

(1) All the affected structures and houses are to be demolished.

(2) Adequate and reasonable written notices shall be given to all owners, occupiers and or developers whose premises are to be affected by the exercise. Other forms of notices may be given in addition to the written notices.

(3) Since we are in the rainy season and to ensure reasonableness and proportionality the evictions shall not be carried out in bad weather or at night unless the affected person otherwise consent.

[**26.**] The last issue in this suit is the claim for compensation by the applicants. They maintain as a basis for the payment of compensation that by the effect of articles 18 and 20(1) and (2) of the 1992 Constitution they are entitled to prompt payment of fair and adequate compensation or alternative accommodation. As against the claim for compensation and the provision of alternative accommodation, the respondents stress that as encroachers and trespassers they are not entitled to either. That, it is further submitted would amount to rewarding them for their wrongful acts.

[**27.**] There is no doubt that the applicants acquired their plots of land for valuable consideration. They must have spent quite a lot of money in erecting their houses or structures and have been residing in them for some time now. It is also not disputed that some of them had building permits issued by the first respondent and pirates and other outgoings have been paid to and accepted by the relevant authorities. It is however my view that searches at the appropriate agencies would have disclosed that the plots they purchased were in a reservation area. Again, going onto the land left them in no doubt that that holdings were across river courses. They nevertheless went ahead to develop their plots notwithstanding the likely consequences. It was a dangerous gamble! Whenever it pours, the area is flooded and poses grave danger to lives and property not only of the applicants but innocent persons and the community in general. The parochial interest of the applicants must give way to that of the public generally.

[**28.**] I am persuaded by the Supreme Court of India's observation in the case of *Almitra H Patel v Union of India* that rewarding an encroacher on public land with free alternative sites is like giving a reward to a pick-pocket. The applicants were not entitled to be on the land in the first place. Since their properties have not been compulsorily acquired by government within the meaning of article 20 of the 1992 Constitution as contended by learned counsel for the applicants, I hold that they are not entitled to compensation under the Constitution. If the applicants are entitled to any compensation at all their claims could only be made under section 56 of Act 462 *supra*. I am however of the view that in all the circumstances of this case the applicants are not entitled to any compensation. Encroachers cannot have any right to compensation or alternative accommodation.

[**29.**] I must say that I find myself not too comfortable with the orders I have had to make. This is because of the likely consequences on the affected applicants and their families. This situation has arisen because they threw caution to the wind and felt their activities would be condoned. The law has now caught up with them and their

properties must be demolished. I hope, it is a hope, that the message sent in this judgment would make people sit up! Neither is the conduct of the 1st respondent commendable. As a public authority entrusted with the planning of the area within it jurisdiction this situation has arisen mainly because its officers were not diligent enough to nib the activities of the applicants in the bud as soon as they commenced their developments. They seem to have stood by giving them a false sense of security and hope. I have noted that some building inspectors have been sanctioned as a result of this case. It is hoped it does not end with mere interdictions! In conclusion I shall dismiss the suit. There will be no order as to costs.

MALAWI

Masangano v Attorney-General

2009 AHRLR 353 (MHC 2009)

Gable Masangano v The Attorney-General

High Court of Malawi at Lilongwe, Constitutional Case 15 of 2007, 9 November 2009

Judges: Mzikamanda, Chinangwa Chombo

Cruel, inhuman or degrading treatment of prisoners

Cruel, inhuman or degrading treatment (conditions of detention, 2-3, 7-8, 10, 34, 47, and 52)
Judicial review (resource allocation, 28)

[**1.**] This is a judicial review. The matter was commenced in the High Court Principal Registry as Miscellaneous Application 132 of 2006. On 21 September, 2007 Acting Chief Justice HM Mtegha certified these proceedings under section 3(2) of the Courts (Amendment Act) 2004 as substantially relating to and concerning the interpretation or application of the provisions of the Constitution of Republic of Malawi. It was directed that the matter be heard and disposed of by a Panel of not less than three High Court Judges. A panel consisting of Nyirenda J, as he then was, Singini J, as he then was and Chinangwa J was constituted. The matter was set down for hearing on 10 March 2008 at 9:00 in the forenoon. It seems the hearing did not take place on the scheduled date. Two members of the panel, namely Nyirenda J and Singini J, were appointed Supreme Court Justices. Subsequently the Panel was reconstituted to be composed of Mzikamanda J, Chinangwa J and Chombo J. The matter was heard on 17 February 2009. This now is the judgment.

[**2.**] The court bundle as presented by the applicant here shows that the applicant is suing the respondents on his own behalf and on behalf of all prisoners in Malawi. The applicants' affidavits show that he is a convicted prisoner serving a 12 year prison term effective 2006. He was first at Chichiri Prison but presently he is at Domasi Prison. He avers that ever since his imprisonment, he and his fellow prisoners have been subjected to torture and cruel, inhuman and degrading treatment or punishment which is an infringement of his rights which

he believes to be nonderogable as per section 44 of the Constitution. Among other things the prisoners are subjected to:

> (a) Insufficient or total lack of ordinary diet which only comprises maize meal (*nsima*) and peas or beans contrary to the third Schedule of the Prison Regulations in the Prisons Act Cap 9:02 of the Laws of Malawi; (b) Insufficient or total lack of food stuffs in that only one meal is normally served per day with no breakfast contrary to the third Schedule of the Prison Regulations; (c) Insufficient or total lack of clothing and accessories such as two pairs of shorts, singlets, soap, a pair of sandals contrary to the fourth Schedule of the Prison Regulations; (d) Insufficient or total lack of cell equipment such as blankets, sleeping mats and mugs contrary to the fifth Schedule of the Prison Regulations; (e) Insufficient or total lack of space in the cells as they are always congested in a total number of 120 persons that are made to occupy a cell meant for 80 persons; (f) That the prisoners are denied the right to chat with their relatives as the prison warders close the visitors' room so that prisoners should not have a chance of chatting; (g) That the prisoners are harassed and physically tortured by the warders in front of their relatives; (h) That only prisoners with money have access to communication; (i) That prisoners are denied access to medical attention and the right dose for a person to fully recover and are even asked the offence they committed before receiving any medical attention and are even sometimes given wrong dosage.

[**3.**] The applicant further avers that the prisoners are not allowed to do some exercises and if they are found doing such act they are called by the most top boss and given punishment while being accused that they are planning to escape. Donations received for prisoners are only given to them half their share and the prisoners do not know where the rest goes. For all the above, the applicant verily believes that there is need to have an interpretation or application of the provisions of the republican Constitution against these infringements of the said rights in making an order against the authorities responsible in the form of judicial review. The applicants believe that the respondents are acting unconstitutionally and unlawfully in that the prisoners' non-derogable constitutional rights not to be subjected to torture and cruel, inhuman and degrading treatment or punishment have been grossly violated.

[**4.**] The affidavit in opposition was sworn by the Chief Commissioner of Prisons, Mr Macdonald Luciano Chaona. According to that affidavit, in the SADC region each prisoner is supposed to be allocated 0.68 kg of maize flour for consumption per day to go with a day's relish. The 0.68 kg is meant to cater for both lunch and supper. About 25 bags of 50 kgs each of beans are consumed per day. In prisons such as Bzyanzi in Dowa, the prisoners are given three meals a day from the same 0.68 kg of maize flour and are provided with mosquito nets. This is possible because there are few prisoners at Bzyanzi, relatively proportionate to the capacity of the available cooking utensils and machinery at the prison. The position is different with Maula and Chichiri prisons which host almost double the number of prisoners those prisons were initially designed to hold. As a result, it would be difficult for the prisoners in these prisons to be given three meals a day as this would practically mean that some prisoners

would be having their breakfast at lunch time, their lunch at supper and supper sometime in the early hours of the morning. There would be difficult management and administrative problems and that might affect the security detail of the prisons. Despite these problems each prisoner still gets the required 0.68 kg of maize flour per day in that single meal. Since 0.68 kg of maize flour per prisoner is more than enough for a single person for a single meal, the prisoners actually split the meal into two portions, one for lunch and the other for supper. The prisoners are on occasion fed fish, meat and vegetables dishes. They have access to safe drinking water with Maula paying about K600 000 per month in water bills. The farming or agricultural activities have been intensified in prison farms and have considerably improved the food situation in the prisons. Government has already provided more farming land to the Prison Department such as Makande in Thyolo, Maula garden and Nkhate in Nsanje. There is poultry farming benefiting prisoners as eggs are provided to prisoners admitted at hospital. The prisons are planning to keep cattle for the benefit of the prisoners in terms of food and milk. Prisoners are allowed to get food from their relatives.

[**5.**] He further averred that government is already devising and implementing policies aimed at decongesting and improving the living conditions in prisons. Government has reopened Mikuyu and Nsanje prisons and both prisons are currently undergoing renovation works. New 300 capacity cell blocks have just been completed in the Mwanza, Ntchisi, Chitipa and Mulanje prisons to help ease congestion problems. Government has already approved the building of two more prisons in the districts of Ntchisi and Mwanza. Government has also approved the building of a new maximum security prison in Lilongwe. Government, in partnership with DFID has just finished the construction of the Mzimba prison facility. All these projects attest to the fact that government is indeed progressively trying to solve the congestion problem in its prisons in all the three regions of the country.

[**6.**] Regarding prison clothing, it is not possible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds. The prison authorities had requested K1.2 billion as allocation for the year but only got K265 million as approved by parliament. The lack of sufficient clothing has been aggravated by the increase in number of prisoners due to escalating levels of crime in the country. The prison authorities are discussing with various donors to provide the same funding to supplement the shortfalls in the resources available. He thus prays that the application for judicial review be dismissed with costs.

[**7.**] The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. It is

to ensure that the applicant is given fair treatment by the authority to which he has been subjected. It is not intended to substitute the opinion of the judiciary or indeed the individual judges for that of the authority constituted by law to decide the matters in question (see *R Mpinganjira and Others v Council for the University of Malawi* Misc Civil Cause No 4 of 1994. *The State v the Attorney General, The Inspector General of Police, The Commissioner of Police (Central)* Misc. Civil Cause No 49 of 2008). The present matter is about the realisation of prisoners' rights as guaranteed under the Republic of Malawi Constitution and relevant laws under it, especially the Prisons Act Cap 9:02. The question we are called upon to address is whether since his imprisonment, the applicant and the other persons whose representative capacity he is acting for have been subjected to torture and cruel, inhuman and degrading treatment or punishment being an infringement on his rights and those of the other persons. This case is concerned with the realization of human rights of prisoners and the state's constitutional obligations in relation to prisoners and prison conditions.

[**8.**] Section 42(1)(b) of the Republic of Malawi Constitution provides that every person who is detained, including every sentenced prisoner shall have the right to be detained under conditions consistent with human dignity, which shall include at least the provision of reading and writing materials, adequate nutrition and medical treatment at the expense of the state. The South African Constitution under section 35(2)(e) includes at least exercise and adequate accommodation as part of the rights of prisoners. The Prisons Act Cap 9:02 of the Laws of Malawi provides for the establishment of prisons within Malawi, for a Prison Service, for the discipline of Prison Officers, for the management and control of prisons and prisoners lodged therein and for matters incidental thereto. Under the Prisons Act are Prison Regulations which include a part on the admission and confinement of prisoners, among other parts of the regulations. The third schedule to the Act deals with the diet of the prisoners and daily issues. The fourth schedule deals with prisoners' clothing and accessories while the fifth schedule deals with cell equipment, such as the number of blankets for cold season and the number of blankets for hot season, besides sleeping mat and mug. In each of the schedules referred to there is a scale provided on the quantities to be provided. The applicants in this case complain that the respondents have failed to meet the minimum constitutional and statutory obligations placed on them with respect to the applicant and all prisoners as well as with respect to prison conditions.

[**9.**] The skeletal arguments for the applicants show that leave to apply for judicial review in this matter was granted on 4 October 2006. The applicants allege that the respondents have acted and continue to act illegally and irrationally by arbitrarily depriving them of what they are entitled to in terms of food rations, clothing and

other hygiene equipment and cell space under the Prison Regulations of the Prisons Act. Thus the respondents are in breach of section 19 subsections (1), (2) and (3) of the Constitution of the Republic of Malawi. The applicants argue that the respondents do not dispute the constitutional violations as alleged by the prisoners but they say they do not have resources to comply with the prescriptions of the Prisons Act at once. The applicants argue that life in Malawi prisons is regulated by the Constitution, the Prisons Act and international law, which laws aim at establishing minimum standards under which prisoners should be held. The applicants suggest that the practical rationale for these minimum standards is not to make prisons places of comfort and luxury like hotels, but places for penal reform where occupants do not lose their basic human dignity just because they are under the incarceration of the state. The specific prescription by the Prison Regulations as to how much food and what food a prisoner is entitled to per day, and what cell equipment, inclusive of clothing and beddings, are minimum standards that must be complied with by the respondents, so the applicants argue. They further argue that lack of resources cannot be an answer to these statutory standards. They also argue that the act of giving prisoners one meal a day is not in tandem with the right to human dignity under section 19(1) of our Constitution. Food is very basic to the sustenance of human life, and providing prisoners with a single meal of *nsima* and beans over long periods of time is cruel and inhuman, the applicants argue. Similarly the omissions by the respondents to provide basic clothing and beddings as complained of by the prisoners is cruel, inhuman treatment while the overcrowding complained of by the prisoners must be interpreted by the court as degrading treatment. The applicants suggest that there is no other way of interpreting a situation where there are half naked prisoners surviving on a single meal of *nsima* and beans or peas a day and living in overcrowded conditions. The applicants have referred to a report of the Malawi Prison Inspectorate, a body constituted under section 169 of the Republic of Malawi Constitution. That body is charged with the monitoring of conditions, administration and general functioning of penal institutions, taking due account of applicable international standards. In its 2004 report the Malawi Prison Inspectorate states that: 'In most of the prisons visited, the inspectorate noted that diet for prisons continue to be poor.' The prisoners complained of being served with monotonous diet of *nsima* (*mgaiwa*) and beans/pigeon peas once a day. The inspectorate also observed that: 'However it is pleasing to note that this diet is supplemented by vegetables in almost all the prisons.'

[**10.**] On overcrowding the Inspectorate noted that congestion continues to be the most serious problem in our prisons. The prison population continues to grow as a result of rising crime rate while the prison structures remain the same. The prison conditions have not

improved since 2004 when the report was issued. The minimum standards under the Prison Regulations are in tandem with international standards in the Minimum Rules for the Treatment of Prisoners as adopted by the first United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955. The United Nations Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment is simply reflected in our constitution. The practice promulgated by section 169 of our constitution is at par with what obtains in Europe. The applicants cited in support the case of *Linton v Jamaica*, UNHRC communication 258/1987, 22 October 1992, which held that withholding food or water is inhuman treatment. Also cited were four other foreign cases in support of the proposition that lack of fresh air, sunlight and exercise can amount to inhuman treatment. (See *Mc Cann v Queen* 1976 IFC 570 (TD); *Siewpersaud and Others v Trinidad and Tobago*, UNHRC communication 938/200, 19 August, 2004; *Conjwayo v Minister of Justice of Zimbabwe* (1992) 12 Commonwealth Law Bulletin 1582; *Dennis Labban v Jamaica* UNHRC communication 799/ 1998, 13 May, 2004). The applicants cited *Jaipal v State* 18 February, 2005, Commonwealth Human Rights Law Digest 5 CHRLD 359-520 Issue 3 Summer 2006 at 417 as authority for the proposition that overcrowding and lack of resource is unconstitutional. The applicants invite this court to take judicial notice of press reports that the prevalence rate of HIV/AIDS in our prisons is very high. The 2004 Prison Inspectorate report observed that due to overcrowding there were 12 deaths per month in our prisons, making the situation a matter of grave concern according to the International Committee of the Red Cross mortality rate. The applicants pray that this court holds that the conditions under which they are being held do amount to cruel, inhuman and degrading treatment and to declare the acts and omissions of the respondents complained of by the applicants as unconstitutional.

[**11.**] The respondents' arguments are that they are not proper parties to these proceedings. They cited the case of *State v Attorney General, ex parte Dr Cassim Chilumpha* Misc Civil Cause 302 of 2005 where the court held that in a judicial review application the correct party should and is the authority that actually exercised the statutory duty or power. Also cited was the case of *The State and Attorney General, Mapeto Wholesalers and Faizal Latif, ex parte, Registered Trustees of Gender Support Programme* Civil Cause No 256 of 2005 where Mkandawire J, observed that judicial review proceedings are not legal suits and are not covered by the provisions of the Civil Procedure (Suits by or Against the Government or Public Officers) Act, whereby invariably the government is sued through its Principal Legal Advisor who happens to be the Attorney-General. His Lordship was able to observe that:

> The position is now well settled that the Attorney-General cannot be the Respondent unless it is shown that the office of the Attorney-General was party to the decision which is being challenged.

[**12.**] It was argued that nowhere in this instant case has it been shown that the Attorney-General made the purported decision being challenged. Again it was argued that it has not been shown with sufficient particularity as to when the purported decision was made by the respondents and which particular authority made the purported decision being challenged.

[**13.**] In so far as the Attorney-General did not make the said decision and is so far as it has not been shown as to who actually made the decision being challenged, the respondents are not proper parties to these proceedings, so the respondents argue.

[**14.**] The respondents also argue that in terms of Order 53 rule 4 of RSC it is not clear whether the application for judicial review was made promptly as the applicants have not demonstrated as to when the decision under challenge was made. The applicants' affidavit would suggest that the grounds of judicial review arose in 2004 following the Malawi Prison Inspectorate report. If that be the case and since Order 53 rule 4 RSC requires that judicial review proceedings be commenced within three months from the date when the grounds for application arose, the present application is time-barred.

[**15.**] The respondents also argue that the present matter is non-justiciable. The matter, it is so argued, concerns issues raising questions with which the judicial process is not equipped to deal. They argue that nature and subject matter of power may render disputes about a particular exercise unsuitable for judicial review because they raise politically sensitive issues of national policy or national security. The dictum of Lord Diplock in *Council of Service Unions v Minister for the Civil Service* [1985] AC 374 at 411 was cited in support. Also cited was the case of *R v Criminal Injuries Compensation Board, ex parte P* [1995] I ALL ER 870 which held that decision about allocation of resources by a public power are not generally justiciable as decisions involving a balance of competing claims on the public purse and the allocation of economic resources, are matters which courts are ill-equipped to deal with. The case of *Ministry of Finance ex parte SGS Malawi Limited* Misc Civil Application 40 of 2003 was also cited where Mwaungulu J, pointed out that matters involving social and economic policy, matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review proceedings.

[**16.**] The respondents observe that the issue at the core of this judicial review application involves the allocation of state resources to prisoners. The allocation of resources involves issues of value judgment regard being had to economic and policy considerations and

these are matters according to judicial practice non-justiciable in judicial review, so they argue. Thus they pray that the application be dismissed because the matters here are non-justiciable, hence unarguable.

[**17.**] The respondents also argue that there are alternative remedies available to the applicants. It is trite law that a court may in its discretion refuse to grant permission to apply for judicial review. As a general principle an individual should normally use alternative remedies where they are available rather than judicial review (see *R v Epping and Harlow General Commission ex parte Goldstraw* [1993] 3 ALL ER 257). Thus in the present case the applicants should have recourse to section 108(2) of the Constitution for remedies provided under sections 46(3) and (4) of the Constitution.

[**18.**] The respondents also argue that the general principle is that most statutory provisions do not lend themselves to enforcement by *mandamus*. The provision of amenities and facilities pursuant to the Prisons Act, Cap 9:02 of the Laws of Malawi does not impose unqualified obligation on the public authorities as it largely depends on availability of resources in the country. The respective public bodies are merely obliged to make reasonable effort to provide for the meals, foodstuffs and clothing to prisoners as per *R v Bristol Corporation ex parte Handy* [1974] 1 WLR 498 and as provided for in the Principles of National Policy section 13(b) and (c) of the Constitution. The claims by the applicants are not expressly covered or guaranteed under chapter IV of the Constitution of Malawi as that chapter centres on civil and political rights for which remedies and procedures for redress are provided in the case of violation.

[**19.**] Under section 13 of the constitution the state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the goals of nutrition and health. These principles of national policy are directory in nature. Citing passages in *Minister of Health v TAC*, CCT 59/04 p 5 and p 7, decision of the South African Constitutional Court, the respondents go on to argue that the obligations imposed on the state by the Constitution in regard to access to housing, health care, food, water and social security are dependant upon the resources available for such purposes and that the corresponding rights themselves are limited by reason of the lack of resources. Therefore given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled. There are budgetary and policy decisions that are involved in the realisation of these rights. The Constitution accepts that it cannot solve all society's woes overnight, but must go on trying to resolve these problems, progressively.

[**20.**] The respondents argue that before one can move the court to determine that a violation of a socio-economic right has occurred, several issues need to be looked at including a review of government policies and legislation and may involve research in a particular field of rights. The provision of housing, nutrition and clothing as stipulated in the Prisons Act should be read subject to section 13 and 14 of the Constitution taking into account the availability of resources in the country. A judicial review would not fully address the issues. The respondents pray that the reliefs sought ought not to be granted as granting the same would cause substantial hardship to the administration of prison facilities.

[**21.**] This Court has evaluated all the material placed before it including the skeletal arguments and the oral arguments advanced by counsel on both sides. The Court has also examined the applicable law together with relevant international legal instruments and the case law, both local and foreign.

[**22.**] An issue as to whether the respondents were proper parties to these judicial review proceedings must be addressed first.

[**23.**] The law on parties to a judicial review was correctly put by Mkandawire J, in the *State v Attorney General, Mapeto Wholesalers and Faizal Latif ex-parte Registered Trustees of Gender Support Programme* Civil Cause 256 of 2005 and also as held in *State v Attorney General ex parte Dr Cassim Chilumpha* Misc. Civil Cause 302 of 2005. A judicial review is not a civil suit and is not covered under the provisions of Civil Procedure (suits by or against the government or public officers) Act Cap 6:01 of Laws of Malawi. A judicial review application is mostly brought on behalf of the state and against the authority that actually exercised the statutory duties or powers under review, *ex parte* the applicant. It is not a suit brought against the government through its principal legal advisor who is the Attorney-General. Thus in a judicial review the Attorney-General cannot be a respondent unless it is shown that the Attorney-General was a party to the decision or action which is being reviewed.

[**24.**] In the instant case the documentation appears to be confusing. The documents on filing for judicial review showed Gable Masangano as the plaintiff and the Minister of Home Affairs and the Commissioner of Prisons as the first and second defendants respectively. The skeletal arguments and other documents show Justice Mbekeani (suing on his own behalf and on behalf of all prisoners in Malawi) as the applicant and the Attorney-General as the first respondent, the Minister of Home Affairs and Internal Security as the second respondent and the Commissioner of Prisons as the third respondent. It was explained that Justice Mbekeani was subsequently replaced by Gable Masangano, again suing on his own behalf and on behalf of all prisoners in Malawi. It must be emphasized that a judicial review is not a civil suit. No one sues in a judicial review. It is an

application to have a decision or action reviewed. Therefore Justice Mbekeani and Gable Masangano were incorrectly described as plaintiffs suing on their own behalf and on behalf of all prisoners in Malawi.

[**25.**] It is not clear when and how the Attorney-General was made a respondent to the judicial review. There does not seem to have been an application or an order of court adding the Attorney-General as a respondent. It is also not clear why the Attorney-General was made a respondent to the judicial review proceedings in this matter. It must be appreciated that the present matter is a 2006 matter and has been before various panels of the Constitutional Court before it was brought before us in 2009. That notwithstanding we are of the firm view that the Attorney-General was incorrectly introduced as a respondent to the present judicial review proceedings. The mere fact that the Attorney-General is principal legal advisor to government does not make the Attorney-General a respondent in a judicial review concerning a public institution or a department of the government. This matter is about prisoners' rights within Malawi and the manner in which prisoners are treated by prison authorities. The second and third respondents being the Minister of Home Affairs and Internal Security under which prisons in Malawi directly fall and the Chief Commissioner of Prisons are the proper parties, not the Attorney-General. So we find.

[**26.**] An issue was raised that the present proceedings are time barred. The law was correctly argued that Order 53 rule 4 of the Rules of the Supreme Court Practice provides that an application for leave for judicial review be made promptly and in any event within three months from the date when the grounds for the application first arose unless the court considered that there is good reason for extending the period within which the application shall be made. However, this court is unable to appreciate the respondents' argument that the grounds of judicial review herein arose in 2004 when the applicant was arrested. It is clear from the application that the grounds of application were a daily experience even at the time the application was made. The argument that the application is time-barred is ill-conceived and cannot stand. We firmly believe that this application is not time-barred.

[**27.**] The respondents have also raised an issue that the present matter is non-justiciable. A matter appropriate for court review is said to be justiciable. Thus justiciability concerns the limits upon legal issues over which a court can exercise its judicial authority. Justiciability seeks to address whether a court possesses the ability to provide adequate resolution to the issue before it, and where a court feels it cannot offer a final determination to the issue, that issue will be said to be non-justiciable. The concept of justiciability or non-justiciability must be viewed separate from the issue of jurisdiction.

The concept of non-justiciability is more akin to the concept of exercise of judicial restraint, rather than the court having no jurisdiction. In articulating the doctrine of non-justiciability in *Buttes Gas and Oil Co v Hammer* (No 3) [1982] AC 888 the House of Lords referred to there being 'non judicial or manageable standards' by which a court can judge those issues; or because adjudication of such issues would cause 'embarrassment' to the forum's executive as a basis for classifying a matter as non-justiciable. The doctrine of non-justiciability has had a fair amount of criticism because it renders litigation between private parties non-justiciable. It seeks to protect forum executive and undermines private rights while weakening the doctrine of separation of powers (see Sim Cameron 'Non-justiciability in Australia Private International Law: A lack of judicial restraint' (2009) 10(1) *Melbourne Journal of International* Law 102). In fact it has been argued that there are strong reasons to doubt the desirability of the doctrine on non-justiciability in that it has the potential of obstructing confidence and certainty in the expectation of access to the courts for private litigants.The case of *Buttes Gas and Oil Co v Hammer* (*supra*) was predicated on a misunderstanding of the political question doctrine of the United States of America and the merit based approach of Canada. Thus the application of the doctrine in the United Kingdom is in the decline. The judiciary must prioritise private rights over political concerns and maintain access to the courts.

[**28.**] In so far as the respondents argue non-justiciability of the matters before us, it is clear that the arguments are reminiscent of the long-established principle that prison authorities possessed complete discretion regarding the conditions of confinement of prisoners and that the courts had no authority, not even jurisdiction, to intervene in this area. But that principle belongs to the old days when the human rights culture was in its rudimentary stages of development. In the present day and age where we have new constitutional orders deeply entrenching human rights and where the human rights culture is fully fledged and continues to bind all public institutions, courts cannot stand by and watch violation of human rights in prison as complained of by prisoners. Prisoners may have their right to liberty curtailed by reason of lawful incarceration; they however retain all their other human rights as guaranteed by the constitution whose guardians are the courts. What happens in prisons is no longer sacrosanct. Cited before us were the cases of *Council of Service Chum v Minister for the Civil Service* [1985] A.C. 374 more especially the dictum of Lord Diplock at page 411, *R v Criminal Injuries Compensation Board ex parte* P. [1995] 1 ALL ER 870 and *Ministry of Finance ex-party SGS Malawi Ltd* Misc Civil Application No 40 of 2003 to support the contention that the matters before this court are non-justiciable. In the latter case it is said that Mwaungulu, J pointed out that matters involving social and economic policy,

matters of policy and principle, matters involving competing policy considerations are clearly non-justiciable in judicial review. We have not had the opportunity to read the opinion of Mwaungulu J, in the case cited. However, it seems that Mwaungulu J, was addressing the issue of policy consideration and not issues of prisoners' rights. We do not think that a court should adopt a hands-off approach where there is a complaint of violation of prisoners' rights or human rights. In fact in *Kuwait Airways Corporation v Iraqi Airways (Nos 4 and 5)* [2002] 2 AC 883, at 1101 per Lord Steyn agreed that the doctrine of non-justiciability is not a categorical rule. Thus when *R v Criminal Injuries Compensation Board ex-parte P* (*supra*) held that decisions about allocation of resources by a public power are not generally justiciable it does not mean that the same is categorically non-justiciable. A court will examine each case and the circumstances before it can say that the matter is not subject to the courts supervisory control, ie that the decision is of a particular nature which lies outside the domain of the courts as being the preserve of another arm of government. That in our view would be consistent with the provisions of section 103(2) of our Constitution which states that: 'The judiciary shall have jurisdiction over all issues of judicial nature and shall have exclusive authority to decide whether an issue is within its competence.' This provision also reflects the independence of the judiciary which is a key pillar in the administration of justice. Even in the United Kingdom prison decision-making has been opened up very much to judicial review since the House of Lords decision in *R v Board of Visitors of Hull Prison Ex parte St Germain* [1979] QB 425 where it was held that an allegation that disciplinary proceedings before the board of prison visitors had not been conducted in accordance with the law was justiciable. On the argument that socio-economic rights are non-justiciable we would like to suggest that modern legal and judicial thinking has significantly diminished the importance of such an assertion. Eric C Christiansen, an Associate Professor of Law at Golden Gate University School of Law California in his article 'Adjudicating nonjusticiable rights: Socio-economic rights and the South African Contitutional Court' had this to say:

> It has historically been argued and traditionally accepted that socio-economic rights are nonjusticiable. Advocates of this position have asserted that, while rights to housing, health care, education and other forms of social welfare may have value as moral statements of the nation's ideals, they should not be viewed as a legal declaration of enforceable rights. Adjudication of such rights requires an assessment of fundamental social values that can only be carried out legitimately by political branches of government, and the proper enforcement of socioeconomic rights requires significant government resources that can only be adequately assessed and balanced by the legislature. Judges and courts, according to this argument, lack the political legitimacy and institutional competence to decide such matters. Nevertheless, a steadily increasing number of countries have chosen to include socio-economic rights in their constitutions — with varying (and sometimes unclear) levels of enforcement. At the core of such 'social rights' are rights to adequate housing, health care, food, water, social security and

> education. Each of these rights is enumerated in the 1996 South African Constitution. Moreover, most of them have been the subject of full proceedings before the South African Constitutional Court.

[**29.**] Clearly therefore matters of prisoners' rights are matters that this court can deal with just like the South African Constitutional Court has dealt with the various matters of socio-economic rights (See *Minister of Home Affairs v National Institute for Crime Prevention and Re-Intergration and Others* (CT 03/04 [2004] 2ACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 CC, 3 March 2004). In *Conjwayo v Minister of Justice and Others* [1992] (2) SA 56 at page 60 Gubbay CJ said:

> Fortunately the view no longer obtains that in consequence of his crime forfeits not only his personal rights, except those which the law in its humanity grants him. For while prison authorities must be accorded latitude and understanding in prison affairs, and prisoners are necessarily subject to appropriate Rules and Regulations, it remains the continuingresponsibility of courts to enforce the constitutional rights of all persons, prisoners included.

[**30.**] In *Mothobi v Director of Prisons and Another* (duplicate of A0770020 (CIV/APN/252/96) [1996] LSCA 92 (16 September 1996) the Lesotho Court of Appeal dealt with and adjudicated on prisoners' rights with respect to prison accommodation and amenities. In that case Justice WCM Maqutu was able to order that the applicant be kept in a certain block of the same prison and not the other. The judge was also able to order that dirty walls of the prison be painted, windows washed and kept open when prisoners were not there. The judge further ordered that water toilets be provided inside the cell within 90 days, saying this should be easy and relatively cheap. His Lordship did say that after visiting the prison that:

> I was horrified by what I found about the sanitary condition of the cells in Block B. No human being should sleep in a room that has human excrement of others. I endorse the long term reforms but insist that water toilets be provided inside the cells in Block B within 90 days. This should be easy and relatively cheap.

[**31.**] Closer home it was reported in SALC bloggers, being a discussion of human rights issues in Southern Africa that the Malawian Constitutional Court on 27 August, 2009 handed down a judgment in the case of *Evance Moyo* who was kept at Maula Prison, ordering his release from prison. In that case the Court had found that Evance Moyo's constitutional rights were violated in respect of not being accorded the special treatment owed to juvenile prisoners by him having been placed in the overcrowded Chichiri Prison Conditions (http://salcbloggers.wordpress.com/2009/08/28/evancemoyo-judg ment-handed-down-in-... accessed on 21st October, 2009). This provides yet further evidence that the issues before us cannot categorically be described as non-justiciable. We will therefore proceed to deal with them. The reference to section 13 of our Constitution on principles of national policy and section 14 of the same Constitution on the application of the said principles of national policy that they are directory in nature as a basis for saying that the

present matters are non-judiciable does not provide a sound basis for the argument. In any event section 14 of the Constitution further provides that:

> Courts shall be entitled to have regard to them in interpreting and applying any provisions of this Constitution or any law or in determining the validity of decisions of the executive and in the interpretation of the provisions of this Constitution.

No part of our constitution is a no-go area for the courts in so far as section 9 of the same constitution places the responsibility of interpreting, protecting and enforcing the constitution on the judiciary.

[**32.**] The respondents argued that the applicants have alternative remedies which they could pursue under section 108(2) of the Republic of Malawi Constitution, the remedies being under section 46(3) and (4) of the said Constitution. Section 108(2) of the Constitution is about the original jurisdiction of the High Court to review any law and any action or decision of government for conformity with the Constitution. Section 46(3) and (4) provide that a court that finds that rights or freedoms conferred by the constitution have been unlawfully denied or violated may make any orders that are necessary and appropriate to secure the enjoyment of those rights and freedoms and also may award compensation. In fact section 46(3) provides also that where a court finds that a threat exists to such right and freedom, it shall have power to make any orders necessary and appropriate to prevent those rights and freedoms from being unlawfully denied or violated. With respect it is difficult to appreciate the respondents' argument on alternative remedies as argued by them. What section 46(3) and (4) of the Constitution provide for are the very reliefs that the applicants are seeking. Perhaps the respondents had in mind that the present judicial review is under Order 53 of RSC and therefore different from a judicial review as provided for in section 108(2) of the Constitution. Apart from the question of procedure we are unable to see the difference in substance on the remedies or reliefs sought under these judicial review proceedings. The argument of alternative remedies being available for the applicants and therefore that these had to be exhausted first before the present proceedings were commenced is not made out.

[**33.**] So far we have dealt with the competence of these proceedings. Having established that this court can and should deal with the matters complained of by the prisoners we now proceed to determine whether we should grant the reliefs sought or not. In doing so, we will rely on the affidavit evidence and counsel's submissions, this being a judicial review. To recapitulate, the applicants complain that ever since their imprisonment, they have been subjected to torture and cruel, inhuman and degrading treatment or punishment which is an infringement of their rights which are non-derogable as

per section 44 of the Constitution. They complain of violation of what they describe in argument as prisoners' rights. We do not understand prisoners' rights to be a special category of rights apart from human rights. Prisoners' rights must be understood to mean the rights that prisoners have as human beings as they remain incarcerated in a prison. Thus prisoners, even though they are lawfully deprived of liberty, are still entitled to basic or fundamental human rights.

[**34.**] On the specific complaint by the applicants on torture and cruel, inhuman and degrading treatment or punishment section 19(3) of the Republic of Malawi Constitution provides that no person shall be subjected to torture of any kind of cruel, inhuman and degrading treatment or punishment. Internationally, article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights provide that no one may be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In fact the international community has struggled against torture and other cruel, inhuman or degrading treatment or punishment such that in December 1975 the General Assembly of the United Nations adopted a resolution on the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. That Declaration preceded the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

[**35.**] In the case at hand, the complaint regarding torture and cruel, inhuman and degrading treatment or punishment relates to insufficient or total lack of diet, insufficient or total lack of clothing and accessories, insufficient or total lack of cell equipment and insufficient or total lack of space in the congested cells. The applicants' complaint is premised on the standards set in the Malawi Prisons Act Cap 9:02 of the Laws of Malawi. The applicants also rely on the findings and recommendations of the Prison Inspectorate of 2004. According to the applicants the regulations under the Prisons Act Cap 9:02 of the Laws of Malawi are in tandem with the Standard Minimum Rules for the Treatment of Prisoners as adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1955) and approved by the United Nations Economic and Social Council in 1957.

[**36.**] On the issue of insufficient or total lack of ordinary diet and the issue of insufficient or total lack of foodstuffs the applicants argue that they only have one meal served per day with no breakfast and comprising of maize meal and peas or beans. They argue that this is contrary to the third schedule of the Prison Regulations. It is argued that to provide prisoners with a single meal of *nsima* and beans over long periods of time is cruel and inhuman. The third schedule of the Prison Regulations is made under regulations 53 providing for diet, clothing and cell equipment of prisoners. It is pertinent to note that regulation 54 provides that an officer in-charge of a prison may vary the prescribed scale of diet or substitute one item of diet for another. The third schedule was amended by Government Notice 31 of 1982. It provides for ordinary diet of maize meal, or rice or cassava meal or millet meal with peas or beans, fresh vegetables or fresh peas or beans or sweet potatoes, chilies or pepper, dripping or groundnut oil or groundnuts (shelled) or red palm oil, salt, fruit (in season) for all prisons. For class I and II prisons, meat or fresh fish or dry fish, cocoa or coffee, sugar and unlimited water. There are quantities for daily issues prescribed in the schedule. The schedule also provides for penal diet for Class 1 prisons and reduced diet daily issues for class 1 prisons. The quantities given for daily issues are raw weight.

[**37.**] Now on the issues of insufficient or total lack of ordinary diet and insufficient or total lack of foodstuffs, it is not clear in the arguments of the applicants that these quantities as prescribed under the Prison Regulations third schedule are not met. As pointed out the quantities prescribed are daily issues and not issues per meal. On the other hand, the Chief Commissioner of Prisons in his affidavit averred that in the SADC region to which Malawi belongs, the standard quantity of maize flour to be allocated to each prisoner is 0.68 kg. That is also the quantity prescribed under our Prisons Act. He averred that this quantity is to carter for both lunch and supper and that the prisons in Malawi meet this quantity. He averred that in prisons that hold almost double the number of prisoners the prisons were initially designed to hold, such as Maula and Chichiri Prisons, the available cooking utensils are not adequate. In some prisons with small prison populations and with adequate cooking utensils such as Bzyanzi in Dowa, prisoners get three meals a day. For the other prisons with high population and inadequate cooking utensils it is difficult to give the prisoners three meals a day as it would mean some prisoners would be having breakfast at lunch hour. The applicants do not seem to dispute this state of affairs and impracticality as averred by the Chief Commissioner of Prisons. Maize meal and peas or beans are items listed as ordinary diet food stuffs. It is not correct to say that there is total lack of diet in Malawi prisons or total lack of foodstuffs. Then of course the quantities as stipulated in the Prisons Act are said to be met on the daily basis. The applicants have alleged insufficiency of diet and foodstuffs. Perhaps this does not apply to quantities. The

Chief Commissioner averred that the 0.68 kg given to each prisoner is more than enough for a single meal and the prisoners actually split the meal into two portions, one for lunch and the other for supper. That point does not seem to have been disputed. The respondents further aver that on occasions the prisoners are fed fish, meat and vegetable dishes. These are alternatives provided for under schedule 3. The applicants never challenged this aspect. Reliance was placed on 2004 Malawi Prison Inspectorate report which stated at page 12 that:

> In most of the prisons visited, the inspectorate noted that diet for prisons continues to be poor. Prisoners complained that they are always served with a monotonous diet of *nsima* (*mgaiwa*) and beans/pigeon peas once a day. However, it is pleasing to note that this diet is supplemented by vegetables in almost all the prisons.

[**38.**] It is to be noted that the report makes no reference to failure by the respondents to meet the minimum standards stipulated in the Prison Regulations. The applicants argue that since the 2004 Malawi Prison Inspectorate report matters have not improved. Against this argument is the averment by the Chief Commissioner of Prisons that farming/agricultural activities have been intensified in prison farms and have considerably improved the situation in our prisons. More farming land has been provided to the Prison Department such as Makande in Thyolo, Maula garden and Nkhate in Nsanje. The prisons are also engaged in poultry farming and from this prisoners get eggs which are fed to the sick. Then they are planning to keep cattle for the benefit of prisoners in terms of food and milk. All these matters have gone unchallenged.

[**39.**] Counsel for the applicants cited to us the case of *Linton v Jamaica* UNHRC communication 258/1987 of 22 October 1992 where it was held that withholding food or water is inhuman treatment. We wondered whether in the present case it can be said that the respondents withheld and continue to withhold food from the applicants. It has not been shown that the respondents have failed to meet the minimum standards prescribed by the Prison Regulations in Malawi. We appreciate that the minimum standards in the Prison Regulations, and the Prisons Act of Malawi, were set up in the 1980s. We are now in a new century, 2009. Things have changed over the years. Prison population has increased. What the applicants have not shown this Court is whether the rise in the prison population has resulted in corresponding reduction in the dietary provision for prisoners. We are not to speculate on that point. If what the Chief Commissioner of Prisons stated is anything to go by, then it can be safely stated in the words of section 13 of our Constitution that the respondents are actively engaged in the promotion of prisoners' rights in so far as the provision of dietary needs for the prisoners is concerned. Eggs and poultry products are not listed in the third schedule of the Prisons Act even though the respondents have introduced them. Then prison farming has been intensified in order

to meet the dietary needs of the prisoners. It is our observation that in so far as the food situation in our prisons the minimum standards set by the Prisons Act and Prison Regulations are met. We also observe that steps are currently being taken by the respondents to improve the food situation and dietary needs in our prison and we would like to encourage them in that respect. The Inspectorate of Prisons in its 2004 report noted that there was goat rearing at Chikwawa, rabbit rearing at Dedza, fish farming in Dedza and Domasi and poultry farming in Domasi, supplementing the diet for prisoners.

[**40.**] We wish however to note that the minimum standards set by the Prisons Act have outlived their time and ought to be amended to raise those minimum standards to meet nutritional needs of the prisoners to address new health challenges of inmates. We were encouraged to learn that in some prisons like Bzyanzi in Dowa, prisoners do get their meals three times a day. We were however at pains to appreciate how prisoners preserve the remaining portion of the meal they get in a one meal situation like Chichiri and Maula prisons. The respondents have not shown how the prisoners keep the other portion of the food until they use it for a second meal. We think that the situation of having one meal a day in some of our prisons is most unsatisfactory, even though the meal meets the daily portion as prescribed by the Prison Regulations. It is time the respondents acquired additional cooking utensils and cutlery as well as repair the cooking pots not working for the prisons in the country to facilitate the provision of at least two hot meals a day to the prisoners in good time. Like the Prison Inspectorate in its 2004 report we are encouraged that vegetables are provided in almost all prisons in the country. We would however wish to encourage the respondents to remove the monotony in the maize meal/peas or beans diet by diversifying within the options given in the third schedule of the Prisons Act. We make these observations and comments not because the respondents have fallen below minimum standards, which we think they have not, but because of the realisation that we need to raise the level of minimum standards if not by law then by taking some progressive steps through policy.

[**41.**] We now turn to the issues of insufficient or total lack of clothing and accessories and insufficient or total lack of cell equipment under the fourth schedule and fifth schedule of the Prison Regulations respectively. The fourth schedule of the Prison Regulations provides for prisoners' clothing and accessories for male and for female prisoners. For male prisoners the schedule provides for two shirts, two pairs of shorts, two singlets (cold season only), two lb soap monthly (where no laundry) and one lb soap monthly (where laundry) and one pair of sandals at the discretion of the officer-in-charge. For female prisoners two dresses, two pair of knickers, two petticoats, two singlets (cold season only) two lb soap monthly (where no laundry) and one lb soap monthly (where laundry) and one

pair of sandals at the discretion of the officer-in-charge. According to the fourth schedule the pair of sandals for both male and female prisoners are to be provided at the discretion of the officer-in-charge of the prison. Such discretion must however be exercised professionally.

[**42.**] While we note that the applicants have alleged and averred insufficient or total lack of clothing and accessories for the prisoners, we also note that no argument has been made to support the averment. For instance the applicants have not demonstrated the basis for alleging insufficient or total lack of clothing and accessories although they also allege that the Prisons Act sets the minimum standards. They have not shown whether and how the minimum standards as set out in the Prisons Act are not met. They have not argued before us whether the minimum clothes and accessories set by the Prisons Act are not provided. We have seen nowhere in the documents and arguments of the applicants indicating how much of the clothing and accessories are given to them for them to say these are insufficient. We have seen nowhere in the arguments of the applicants suggesting that there is total lack of the clothing and accessories. It has not been argued whether the applicants move around without clothes and do not receive the accessories, nor has it been shown what clothes the applicants wear if not those provided by the respondents.

[**43.**] We however note that the Chief Commissioner of Prisons in his affidavit argues that it is not possible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocations of funds as parliament approved a small fraction of the budget they presented to it. The respondents also argue that the lack of sufficient clothing for the applicants has been aggravated by the increase in the number of prisoners due to escalating levels of crime in the country. Even the arguments of the respondent fail to show what in fact is given to the applicants by way of clothing and accessories. Is it only one pair of short trousers or one shirt instead of two, for example? The Prison Inspectorate in 2004 was pleased to note that uniforms were being sewn and provided to some prisoners in the prisons they visited. Be that as it may, it is clear from the arguments of the respondents that they concede the point that the applicants are provided with insufficient clothing. There is no mention regarding the accessories. The argument that it is impossible to provide clothing to prisoners as stipulated in the Prison Regulations because of insufficient allocation of funds tantamount to arguing that the respondents cannot obey the law for the reason given. There is a specific law on provision of specific quantities of clothing and accessories to male and female prisoners. That is a valid law of the land which must be complied with. The law as is put in the Prison Regulations is not a mere aspiration which has to be progressively attained, nor is it the ideal that the law represents. It is in fact the

minimum requirement. The framers of the law setting the minimum standards surely must have known that the minimum standards are achievable and must be achieved. No one should be allowed to disobey the law merely on the ground that he or she does not have sufficient resources to enable them obey the law and fulfill their obligations under the law. The minimum standards place an obligation on the duty bearer to meet those standards and not to bring excuses for not complying with those standards. We therefore hold that the respondents have a responsibility to comply with the minimum standards set in the Prison Regulations by providing the minimum number of clothing and accessories as specifically stipulated in the Regulations.

[**44.**] The fifth schedule of the Prison Regulations provides for cell equipment for the prisoners. They are to be provided with three or four blankets for cold season, two or three blankets for hot season, one sleeping mat, one mug and, where no permanent latrine is available, one latrine bucket or one chamber pot. The observations we made in respect of clothing and accessories equally apply in respect of the allegation of insufficient or total lack of cell equipment. The applicants simply made the allegation but advanced no arguments to support the allegation. Again the respondents in their reply made no reference to the allegation of insufficient or total lack of cell equipment. The Prison Inspectorate observed in its 2004 report that:

> In terms of blankets, the Inspectorate was impressed to note that DFID had provided adequate blankets for all prisoners in the country. Each prisoner had received or was expected to receive at least two blankets.

[**45.**] We can only observe that the stipulations in the fifth schedule of the Prison Regulations are the minimum standards that the law has set and ought to be complied with. Surely the legislature in setting those minimum standards must have known that it was feasible and must have realised that they should provide adequate allocation of funds in the budget of the respondents for the law to be complied with. Parliament cannot make a law like the Prison Regulations and at the same time create a situation where the law should not be complied with by denying the respondents the minimum sums of money they need to comply with the law. If that were the case, parliament, which approves budgets from government departments, would be making a mockery of its own laws.

[**46.**] The next aspect we must consider is insufficient or total lack of space in the cells as they are always congested. An example was given that in a cell meant for 80 prisoners, 120 prisoners would be placed there. In fact the Chief Commissioners of Prisons concedes that in some cases prison population is almost double the number of prisoners the prison was designed to hold. The 2004 Malawi Prison Inspectorate report observed that congestion continued to be the most serious problem in our prisons. The prison population continues

to grow as a result of rising crime rate while the prison structures remain the same with a total holding capacity of 4 500 inmates when at the time of reporting the figure had been over 9 000 inmates. The Prison Inspectorate Report 2004 observed that the problem of overcrowding in our prisons is aggravating by poor ventilation. It noted that death in custody remained a matter of concern with a total of 259 deaths between January 2003 and June 2004. The Inspectorate recommended that similar structures to the model prison with a capacity of 800 inmates that was constructed in Mzimba District be constructed in the other three regions of the country. The Chief Commissioner of Prisons while conceding that the overcrowding in our prisons is a perennial problem on account of escalating levels of crime argues that government is already devising and implementing policies aimed at decongesting and improving the living conditions in prisons. Mikuyu and Nsanje prisons have been re-opened, new 300 capacity cell blocks had just been completed in the Mwanza, Ntchisi, Chitipa and Mulanje prisons, new Mzimba prison facility and that government has also approved the building of a new maximum security prison in Lilongwe. While we commend the respondents for the initiatives and the developments taking place in many of our prisons aimed at decongesting the prisons, the legal question which needs to be answered here is whether keeping inmates in overcrowded prisons aggravated by poor ventilation amounts to torture and cruel, inhuman and degrading treatment or punishment and therefore unconstitutional. The applicants cited four foreign cases that lack of fresh air, sunlight and exercise can amount to inhuman treatment. These are *Mc Cann v Queen* (1976) IFC 570 (TD); *Siewpersaud and Others v Trinidad and Tobago* UNHRC communication 938/2000, 19 August, 2004; *Conjwayo v Minister of Justice of Zimbabwe* (1992) 12 Commonwealth Law Bulletin 1582 and *Dennis Lobban v Jamaica* UNHRC communication 799/1998, 13 May 2004. They also cited the case of *Jaipal v State*, 18 February 2005, Commonwealth Human Rights Law Digest 5 CHRLD 359- 520 Issue 3, summer 2006 at 417 for the proposition that overcrowding and lack of resources is unconstitutional. The Nigerian Case of *Odiate and Others v Attorney-General and Others* was cited, without its citation, for the proposition that overcrowding in prison leading to a risk of spread of disease and failure to provide treatment amounts to torture. In *Mothobi v Director of Prisons and Another* (duplicate of A0770020 (CIV/APN/252/96) [1996] LSCA 92) 16th September 1996 Justice W.C.M. Maqutu of the Lesotho Court of Appeal in dealing with awaiting trial prisoners at Maseru Central Prison observed that:

> In these days when there are water-flush toilets, there is no conceivable reason why any human should stay along with others in a cell meaning 8 paces and 8 paces with a bucket or pail containing his excrement and that of others for fourteen hours. Staying with one's excrement might be understandable but staying with that of others is simply torture.

[**47.**] In the case at hand, we would like to observe that the applicants complain of overcrowding. It is the same overcrowding which the Prison Inspectorate noted was aggravated by poor ventilation and which contributed to the death of 259 inmates in a space of about 18 months. In a room meant for a certain number of inmates one would find almost double the number. That overcrowding has been noted as one factors creating the spread of diseases in prison such as tuberculosis which has been said to be a major cause of sickness and death in prison, along with HIV (see Malawi Policy on Tuberculosis Control in Prisons, June 2007). Apart from poor ventilation and therefore lack of adequate fresh air in our prisons, inmates become packed like sardines, obviously making sleeping conditions unbearable for the inmates. Such kind of conditions in relation to overcrowding and poor ventilation are not consistent with treatment of inmates with human dignity. Put simply, the overcrowding and poor ventilation in our prisons amounts to inhuman and degrading treatment of the inmates and therefore contrary to section 19 of the Republic of Malawi Constitution. It seems to us though that the problem of overcrowding in our prisons is not attributable to the respondents alone. In fact the respondents appear to be at the receiving end of inmates. As has been stated, it is the rise in crime that accounts for the overcrowding for the most part. Perhaps use of alterative ways of dealing with offenders apart from sending them to prison is part of the solution to the problem. While we find that it is unconstitutional to place inmates in an overcrowded and poorly ventilated prison we would wish to state that the responsibility does not lie on the respondents only, although they certainly bear part of the blame. It is their responsibility to provide more prison space and better ventilated prisons.

[**48.**] There was a supplementary affidavit filed by the applicants alleging further violation of prisoners' rights or the applicants' prison rights. It was alleged that prisoners are denied their right to chat with their relatives since prison warders close the visitors' rooms so that the prisoners should not have a chance of chatting. It was alleged that prisoners are harassed and physically tortured by the warders in front of their relatives. It was further alleged that prisoners are not allowed access to communication unless they have money. It was also alleged that prisoners are denied access to medical attention and the right dose for a person to fully recover, and are even asked what offence they committed before receiving any medical attention. Sometimes they are given wrong dosage. According to the supplementary affidavit prisoners are not allowed to do some exercises and those found doing exercises are accused of planning to escape and are punished. Whenever donations are brought for prisoners, the prisoners just get half of the share. They do not know where the rest goes. We have not had anything to substantiate these averments. We are not in any doubt that the applicants have the right

to chat with relatives who visit them at times as regulated in accordance with Prison Rules and Regulations. It would be a violation of such prison rights to prevent or frustrate such chatting in designated places at designated times. If there are designated rooms for chatting with relatives at designated times then that should be complied with provided always that security concerns are taken care of. As to harassment and physical torture in the presence of relatives there has not been material to support it. The 2004 Malawi Prison Inspectorate noted that the Inspectorate had received complaints of abuse of prisoners at Mzimba prison by one prison officer, which the Inspectorate condemned. Other than the abuse by that one officer there is no other evidence. There is no evidence of it continuing after the 2004 incident. Again we would like to state that it is contrary to section 19 of the Constitution to abuse prisoners whether physically or morally.

[**49.**] The averment that only prisoners who have money are allowed access to communication is not quite clear. The question that arises is what that money is for. It is the right of every prisoner to communicate with relatives or legal practitioner in a regulated manner, regulated by the prison authorities.

[**50.**] Again it is the right of every prisoner to access medical treatment and such prisoner should not be asked what offence he/she committed as a precondition for getting the medical attention or treatment. It is also the right of every prisoner to exercise but such exercise must be in accordance with a schedule as regulated by the prison authorities.

[**51.**] As regards donations given to prisons for prisoners, it is not clear how the applicants come to believe that they only get half of what is donated. Pilferage may be there but there is nothing to suggest it is systematic. In any event prison authorities are under an obligation to prevent any missing of donated items for the direct benefit of inmates and to ensure that the same gets to the rightful beneficiaries.

[**52.**] We would like to reaffirm that prisoners' rights include right to food, clothing, accessories and cell equipment to the minimum standards as set out in the Prisons Act and Prison Regulations. Those standards are the minimum that the law dictates and obliges duty bearers to observe. Going below the minimum standards runs the risk of duty bearers not providing anything at all and coming up with seemingly plausible and seemingly convincing excuses. We also affirm that prisoners have a right to appropriate prison accommodation which is not congested and which has appropriate ventilation. They have the right to access to medical attention and treatment like any other human being. They have the right to communicate with relatives and their legal practitioners within regulated limits. They also have the right to exercise within regulated times apart from

access to reading materials. Prisoners have the right not to be subjected to torture and cruel treatment. In this case we hold the view that packing inmates in an overcrowded cell with poor ventilation with little or no room to sit or lie down with dignity but to be arranged like sardines violates basic human dignity and amounts to inhuman and degrading treatment and therefore unconstitutional. Accordingly we direct the respondents to comply with this judgment within a period of 18 months by taking concrete steps in reducing prison overcrowding by half, thereafter periodically reducing the remainder to eliminate overcrowding and by improving the ventilation in our prisons and, further, by improving prison conditions generally. Parliament through the Prisons Act and Prison Regulations set minimum standards on the treatment of prisoners in Malawi, which standards are in tandem with international minimum standards in the area. Parliament should therefore make available to the respondents adequate financial resources to enable them meet their obligations under the law to comply with this judgment and the minimum standards set in the Prisons Act and Prison Regulations.