

SIXTEENTH ANNUAL ACTIVITY REPORT OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 2002 - 2003

I. ORGANISATION OF WORK

A. Period covered by the Report

1. The Fifteenth Annual Activity Report was adopted by the 38th Ordinary Session of the Assembly of Heads of State and Government of the Organisation of African Unity meeting in July 2002 in Durban, South Africa.

The Sixteenth Annual Activity Report covers the 32nd and 33rd Ordinary Sessions of the African Commission respectively held from 17th to 23rd October 2002 in Banjul, The Gambia and from 15th to 29th May 2003 in Niamey, Niger.

B. Status of ratification

2. All Member States of the African Union are parties to the African Charter on Human and Peoples' Rights.

C. Sessions and Agenda

3. Since the adoption of the Fifteenth Annual Activity Report in July 2002, the African Commission has held two Ordinary Sessions.

The agenda for each of the sessions is contained in **Annex I** to this report.

D. Composition and participation

4. The following Members of the Commission participated in the deliberations of the 32nd Ordinary Session -:

- Commissioner Kamel Rezag-Bara Chairperson
- Commissioner Jainaba Johm Vice Chairperson
- Commissioner A. Badawi El Sheikh
- Commissioner Andrew R. Chigovera
- Commissioner Yasser Sid Ahmed El-Hassan
- Commissioner Angela Melo
- Commissioner Hatem Ben Salem
- Commissioner Salimata Sawadogo

The 32nd Ordinary Session took place over a period of 7 days rather than the normal 15 days. As such, the following Members of the African Commission who had intended to attend the Session in the 2nd week were unable to attend the 32nd Ordinary Session as they had prior engagements to attend to in the first week of the Session.

- Commissioner Vera M. Chirwa
- Commissioner N. Barney Pityana

Commissioner Emmanuel V. O. Dankwa sent his apologies for his inability to attend the 32nd Ordinary Session.

5. Representatives from the following nineteen (19) Member States participated in the deliberations of the 32nd Ordinary Session and made statements, -:
Algeria, Benin, Burkina Faso, Burundi, Cameroon, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Gabon, The Gambia, Lesotho, Liberia, Mauritania, Niger, Rwanda, Sudan, Senegal and South Africa.
6. The following Members of the Commission participated in the deliberations of the 33rd Ordinary Session -:

- Commissioner Kamel Rezag-Bara	Chairperson
- Commissioner Jainaba Johm	Vice Chairperson
- Commissioner A. Badawi El Sheikh	
- Commissioner Andrew R. Chigovera	
- Commissioner Vera M. Chirwa	
- Commissioner Emmanuel V. O. Dankwa	
- Commissioner Yasser Sid Ahmed El-Hassan	
- Commissioner Angela Melo	
- Commissioner N. Barney Pityana	
- Commissioner Hatem Ben Salem	
- Commissioner Salimata Sawadogo	
7. Representatives from the following twenty two (22) Member States participated in the deliberations of the 33rd Ordinary Session and made statements -:
Algeria, Arab Saharawi Democratic Republic, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Lesotho, Libya, Mauritania, Namibia, Niger, Senegal, South Africa, Sudan and Zimbabwe.
8. Representatives from UN Specialised Agencies, National Human Rights Institutions and Inter-Governmental and Non-Governmental Organisations (NGOs) also participated in the deliberations of the two Ordinary Sessions.

E. Adoption of the Activity Report

9. The African Commission considered and adopted its Sixteenth Annual Activity Report at its 33rd Ordinary Session.

II. ACTIVITIES OF THE AFRICAN COMMISSION

A. Plan of Work of the African Commission for the period 2003 to 2006

10. The African Commission's mandate of promoting human and peoples' rights and ensuring their protection in Africa is a very wide mandate. In order for the African Commission to successfully discharge its mandate, it would be necessary that a significant amount of human, material and financial resources are made available to it. However, presently, such resources are inadequate and as such the Secretariat has to prioritise its activities in relation to the assistance it renders to the African Commission.
11. Therefore, the African Commission, at its 33rd Ordinary Session considered and adopted a new Plan of Work for the period 2003 to 2006. The previous Plan of Action – the Mauritius Plan of Action covered the period 1996 to 2001.

B. Consideration of Initial/Periodic Reports of State Parties

12. In accordance with the provisions of Article 62 of the African Charter on Human and Peoples' Rights, each State Party undertakes to present every two years from the date of entry into force of the Charter, a report on legislative and other measures taken with a view to giving effect to the rights and freedoms guaranteed under the Charter.
13. The status of submission of Initial and Periodic reports by State parties is contained in **Annex II** of this report.
14. At its 32nd Ordinary Session, the African Commission adopted the Concluding Observations to the Initial Reports of Mauritania, Lesotho, Cameroon and the Periodic Report of Togo. The African Commission had examined the aforementioned reports at its 31st Ordinary Session.
15. At its 33rd Ordinary Session, the African Commission examined the Initial Report of the Saharawi Arab Democratic Republic (combining all the overdue reports).
16. The African Commission expressed its satisfaction with the dialogue that took place between itself and the delegation from the Saharawi Arab Democratic Republic and encouraged the State to continue its efforts in fulfilling its obligations under the African Charter. The African Commission adopted Concluding Observations on the State Report.
17. The Concluding Observations on the Initial Reports of the Saharawi Arab Democratic Republic, Mauritania, Lesotho, Cameroon and the Periodic Report of Togo will be published together with the reports.
18. The African Commission strongly appeals to those States Parties that have not yet submitted their initial reports or have overdue periodic reports to submit them as soon as possible and where applicable, compile all the overdue reports into one report.

C. Promotional Activities

(a) Report of the Chairperson of the Commission

19. During the period under review, the Chairperson of the African Commission undertook the following activities in his capacity as the Chairperson -:
 - Participated in the 2nd Pan African Conference on Penal and Prison Reform which was held from 18th to 20th September 2002 in Ouagadougou, Burkina Faso. The Meeting adopted a Declaration and Plan of Action;
 - Attended a Meeting of the Executive Council of the Ministers of Foreign Affairs of the Commission of the African Union in Tripoli, Libya from 9th to 10th December 2002 which considered amendments to the Constitutive Act of the African Union;
 - Attended a Meeting in London from 5th to 9th February 2003 together with Members of the Bureau of the African Commission and Commissioners Ben Salem and Badawi where the following issues were discussed -:
 - The draft study on the review of the procedures of the Commission which was undertaken by two consultants namely, Frans Viljoen and Salif Yonaba;

- The draft guidelines on the right to fair trial and legal aid in Africa;
- Organisation of a seminar on the economic, social and cultural rights.
- Attended a Consultative Meeting from 20th to 21st March 2003 held in Addis Ababa, Ethiopia between the African Commission and the United Nations High Commissioner for Refugees where a Memorandum of Understanding between the two institutions was discussed;
- Attended the 59th Session of the United Nations Commission on Human Rights from 24th to 28th March 2003 in Geneva and held meetings with the High Commissioner for Human Rights, the Special Rapporteur on issues of Racism, the President of the Committee on Human Rights and the Officer responsible for the Working Group on Minorities as well as a number of NGOs;
- Undertook a Mission to Cote d'Ivoire from 25th to 29th April 2003 to assess the situation of human rights in the country.

(b) Activities of other Members of the Commission

20. During the period under review, Members of the African Commission undertook the following activities -:

The Vice Chairperson, Commissioner John

- Undertook a promotional mission to Senegal from 19th to 23rd August 2002;
- Facilitated at a Seminar for Gambian journalists that was organised by the Secretariat of the African Commission. The Seminar took place from 18th to 19th December 2002 in Banjul, The Gambia;
- Delivered a presentation on the mandate of the African Commission vis-à-vis Economic, Social and Cultural Rights at a Meeting of the World Bank/African Development Bank, which was held in Abuja, Nigeria from 4th to 7th February 2003;
- Participated in the Meeting between the African Commission and Interights which was held in London from 7th to 10th February 2003, which discussed, among other things the Draft Guidelines On The Right To Fair Trial And Legal Aid In Africa and the Consultants' Review of the Procedures of the African Commission;
- Participated in a Consultative Meeting between the African Commission and the United Nations High Commission for Refugees which was held from 20th to 21st March 2003 in Addis Ababa, Ethiopia. The Meeting discussed a draft Memorandum of Understanding that was drawn between the two institutions;
- Attended the Experts Meeting on the Draft Protocol to the African Charter on the Rights of Women in Africa which was held from 24th to 28th March 2003 in Addis Ababa, Ethiopia;
- Was part of the African Union Election Monitoring Team which monitored the elections in Nigeria from 9th to 23rd April 2003;
- Was part of the African Commission's team that undertook a preliminary fact-finding Mission to Côte d'Ivoire from 23rd April to 1st May 2003;
- Presented papers at the 11th Training Course On The Use Of International Procedures For The Promotion And Protection Of Human Rights In Africa which was organised by the African Centre for Democracy & Human Rights Studies and held from 5th to 10th May 2003 in Niamey, Niger;
- Presented papers at a Forum on the Participation of NGOs at the Commission's 33rd Ordinary Session. The NGO Forum took place from 12th to 14th May in Niamey, Niger.

Commissioner Chigovera

- Held two meetings with ZIMRIGHTS, the oldest Zimbabwean human rights NGO. The Meeting was intended to establish communication between ZIMRIGHTS and the Government of Zimbabwe on human rights issues. A member of an International Human Rights Organisation was in attendance at the first meeting. Discussion on the matter is yet to be concluded and it is hoped that further discussion will be held in future;
- Drafted a decision on Communication 240/2001 – Interights et al (on behalf of Mariette Sonjaleen Bosch)/The Republic of Botswana;
- Undertook a promotional Mission to Zambia from 9th to 14th September 2002;
- Attended a Workshop on the theme ‘International Human Rights Treaties and The State Reporting procedure - Limitations and Violations of Human Rights’ and presented papers on topics relating to African Commission, the African Charter and State Reporting under the African Charter. The Workshop was organised by the Human Rights and Documentation Centre of the Faculty of Law of the University of Namibia and took place in Windhoek, Namibia from 7th to 11th October 2002.

Commissioner Badawi

- Wrote a Paper entitled “The African Union and Human Rights with Special Reference to the African Commission on Human and Peoples’ Rights – A Preliminary Reflection” for the 2nd Ministerial Conference on Human Rights;
- Wrote a Paper for consideration at the 33rd Ordinary Session of the African Commission. The Paper was entitled “The Future relation between the African Commission and the African Court on Human and Peoples’ Rights”;
- Attended a Meeting organised by Interights in London from 5th to 9th February 2003. During this Meeting the ‘draft guidelines on the Right to Fair Trial’ and the proposed programme for the Seminar on Economic, Social and Cultural Rights were discussed;
- Continued following up on the preparation for the Seminar on Economic, Social and Cultural Rights. The Seminar is scheduled to take place from **20th to 24th September 2003 in Cairo, Egypt.**

Commissioner Ben Salem

- In August 2002, attended a Meeting of the United Nations Sub-Committee on Human Rights;
- Attended a workshop organised by the Arab Organisation on Human Rights and the Arab Union of Lawyers that was held in Cairo, Egypt in October 2002. This Workshop was a follow up to the World Conference Against Racism;
- Gave a lecture on Human Rights Day (10th December 2002) in Sousse, Tunisia on the theme, ‘Human Rights and Challenges of Globalisation’;
- Gave a lecture in January 2003 at Djerba (Tunisia) entitled ‘Universality and Specificity of Human Rights in the New International Context’;
- Attended a Meeting to finalise the draft guidelines on the right to fair trial. The Meeting was organised by Interights and took place in London from 5th to 9th February 2003;
- Attended a Consultative Meeting between the African Commission and the United Nations High Commissioner for Refugees which was held from 20th to 21st March 2003 in Addis Ababa, Ethiopia. The Meeting discussed a Memorandum of Understanding between the two Institutions;

- Attended an International Seminar in March 2003 in Tunisia which was organised by the Ministry of Religious Affairs on the theme: 'Islam and Peace'. The Seminar discussed issues relating to religion and human rights.

Commissioner Pityana

- Reported on the human rights situation in the countries that he is responsible for namely, Zimbabwe, Swaziland, Mozambique, Botswana and Lesotho;
- Attended a conference on Corporate Social Responsibility in Copenhagen from 21st to 23rd November 2002 as a guest speaker where he spoke on sustainability reporting from the context of human rights in Africa;
- Attended the US-South Africa Leadership Programme looking at perspectives on philanthropy and social responsibility, Duke University, North Carolina from 1st to 7th December 2002;
- Attended the Assembly of CODESRIA, Kampala, Uganda from 8th to 12th December 2002;
- Participated in the Consultative Meeting of the Commission's Working Group on Indigenous Populations/Communities from 31st January to 2nd February 2003, in Nairobi, Kenya;
- On 20th February 2003, addressed a Workshop on the Drafting of the Protocol on the Rights of Women in Africa in preparation for Experts Meeting of African Union to finalise draft Protocol;
- On 13th March 2003, Chaired a Roundtable Meeting on NEPAD and the Role of Higher Education Institutions co-sponsored with Department of Foreign Affairs, Pretoria;
- Attended a Meeting in Mauritius from 17th to 20th March 2003 organised by the Association of African Universities COREVIP. The theme of the Meeting was 'Higher Education in relation to the African Union spotlight on human rights and NEPAD in Africa';
- Gave a lecture on 24th March 2003 to LLM class at University of Pretoria on the Peer Review Mechanism and its relation to the African Commission;
- Made a presentation on 7th April 2003 during a Panel discussion on 'Substantive Democracy; Africa Conference on Elections, Democracy and Governance' held in Pretoria from 6th to 10th April 2003;
- Made a presentation on 12th April 2003 on 'Freedom of Expression and the African Commission' at an All Africa Editors Forum inaugural conference held in Midrand, South Africa from 11th to 13th April 2003;
- Participated in the Ethical Globalisation Initiative founded by former UN High Commissioner for Human Rights Mrs Mary Robinson; African Capacity Building Group Meeting held from 14th to 17th April 2003 at University of South Africa, Pretoria;
- Gave an NGO Briefing on 33rd Ordinary Session of the African Commission in Pretoria, South Africa on 17th April 2003;
- Informed the African Commission that he was awarded the Honourable Mention Award of the 2002 UNESCO Human Rights Award by the Director General of UNESCO at a ceremony held in Mexico City on 6th March 2003.

Commissioner Barney Pityana at the 33rd Ordinary Session of the African Commission bade farewell to the African Commission stating that he had advised the President of the Republic of

South Africa that he would not be available for a further nomination for election to the African Commission at the elections scheduled for July 2003 in Maputo, Mozambique.

Commissioner Salimata Sawadogo

- Attended the First Assembly of States Party to the Statute establishing the International Criminal Court which was held from 2nd to 9th September 2002;
- Participated in the 2nd Pan African Conference on Penal and Prison Reform which was held from 18th to 20th September 2002 in Ouagadougou, Burkina Faso. The Meeting adopted a Declaration and Plan of Action;
- Participated in events commemorating the 54th anniversary of the Universal Declaration of Human Rights, organised by the Ministry for the Promotion of Human Rights of Burkina Faso from 8th to 10th December 2002;
- Participated in the Constituent Assembly of the Association of Burkinabé citizens who had fled the conflict in Côte d'Ivoire. The Constituent Assembly took place in Ouagadougou on 9th January 2003;
- Participated as a Moderator for a training seminar which took place from 30th January to 1st February 2003 specifically on the topic – “Rights of Burkinabe women as enshrined in National, Regional and International Legal Instruments on Human Rights”;
- Participated in a meeting of “Francophone Writers for Peace and Human Rights in Africa” organised by the Ministry for the Promotion of Human Rights of Burkina Faso that was held from 25th to 27th February 2003 in Ouagadougou;
- Participated in the Consultative Meeting between the African Commission and the United Nations High Commissioner for Human Rights held from 20th to 21st March 2003 in Addis Ababa, Ethiopia;
- Participated in the Meeting of Government Experts and the Ministerial Meeting on the Draft Protocol on the Rights of Women in Africa which was held from 24th to 28th March 2003 in Addis Ababa, Ethiopia

Commissioner Emmanuel V. O Dankwa

- Participated in the Expert Consultative Meeting on Regional Economic Communities in Africa organised by the United Nations High Commissioner for Human Rights in collaboration with the Legon Centre for International Affairs, University of Ghana. The Meeting was held from 10th to 12th March 2003 in Accra, Ghana;
- Participated in the Experts on Individual Complaints Procedure by Victims of International Humanitarian Law organised by the Amsterdam Centre for International Law and the Netherlands Institute of Human Rights, Utrecht from 9th to 10th May 2003 in Amsterdam, The Netherlands;
- Carried out work on the constitutional review process in Swaziland in February 2003.

Commissioner Angela Melo

- Participated in a Consultative Meeting between the African Commission and the United Nations High Commissioner for Human Rights in Addis Ababa from 20th to 21st March 2003;
- Participated in a Workshop organised by the United Nations High Commissioner for Human Rights in collaboration with the government of Mozambique on the enhancement of National Human Rights Institutions in Lusophone countries;
- Prepared a draft law on the establishment of a National Human Rights Commission and a National Action Plan on human rights in Mozambique in February 2003;

- Distributed the Resolution and the Robben Island Guidelines on the Prevention of Torture to the Ministries of Foreign Affairs, Justice and Interior, Parliament and to women NGOs in Lusophone countries;
- Undertook a promotional mission to Angola in September 2002.

Commissioner Yassir Sid Ahmed El Hassan

- Undertook a promotional Mission to Djibouti in September 2002;
- Gave lectures on the African Human Rights System under the auspices of the technical cooperation programme framework between the Office of High Commissioner for Human Rights and the Advisory Council for Human Rights in Sudan. The lectures were delivered to the following groups of persons on the following dates -:
 - a) 20th to 24th July 2002 - Human rights seminar for police and security officers;
 - b) 31st July to 3rd August 2002 - Human rights seminar for prison staff;
 - c) 16th to 19th September 2002 - Human rights seminar for Islamic Non Governmental Organizations;
 - d) 12th to 15th October 2002 - Human rights seminar for Journalists.
- Participated on Seminar on national human rights institutions held in Khartoum from 4th to 5th November 2002;
- Held a meeting in August 2002 with the newly appointed Adviser on African Affairs to the President of the Republic of Sudan, Dr Ali Hassan Tajaldien and briefed him about the African system of human rights and specifically urged him to accelerate the process of ratification of the Protocol to the African Charter establishing the African Court on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child;
- Participated in a Consultative Meeting between the African Commission and the United Nations High Commissioner for Human Rights in Addis Ababa from 20th to 21st March 2003;
- Attended the 17th session of Arab Permanent Committee on Human Rights which took place from 17th to 25th February 2003;
- Participated in the 2nd Arab Expert Meeting on International Humanitarian law held In Cairo, Egypt from 27th to 31st October 2002. The meeting drew and designed a plan of action for establishing National Commission for International Humanitarian Law within Arab States.
- Participated in a two-week training course on the theme 'Human Rights: Free and Equal'. The course was organised by the Pearson Peacekeeping Centre and took place in August 2002, in Canada;
- Participated in a Conference titled "Canada is a global model of a multicultural State" at the invitation of the Multicultural Education Foundation. The Conference took place in Edmonton, Alberta, Canada in October 2002;
- Attended the Second Ministerial Conference on Human Rights in Africa which took place from 5th to 9th May 2003, in Kigali, Rwanda;
- From 3rd to 8th April 2003, attended the UN Commission on Human Rights Meeting in Geneva, Switzerland;
- Attended the Experts Meeting on the Draft Protocol to the African Charter on the Rights of Women in Africa which was held from 24th to 28th March 2003 in Addis Ababa, Ethiopia.

21. Altogether, during the period under review, Members of the African Commission undertook promotional missions to the following States Parties -: Senegal, Zambia, Angola and Djibouti.
22. The African Commission at its 33rd Ordinary Session adopted the following Mission Reports -:
- *Reports of Promotional Missions undertaken to the following Member States -:*
 - Burkina Faso - 22nd September to 2nd October 2001;**
 - Cote d'Ivoire - 1st to 5th April 2001;**
 - South Africa - 25th to 29th September 2001;**
 - Senegal - 19th to 23rd August 2002 and**
 - Zambia - 9th to 13th September 2001.**
 - *Reports of the Special Rapporteur on Prisons and Conditions of Detention to the following Member States -:*
 - Namibia - 17th to 28th September 2001; and**
 - Uganda - 11th to 23rd March 2002.**

Report of the Fact-finding Mission to Zimbabwe

23. Commissioner Pityana presented the report of the Fact-finding Mission to Zimbabwe that was undertaken from **24th to 28th June 2002**. The African Commission however resolved to defer further consideration of the report to the 34th Ordinary Session when the report once translated into the working languages of the African Commission would be formally considered and adopted.
24. The distribution of State Parties among Commissioners for their promotion and protection activities is contained in **Annex III** of the report.

(c) Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa

25. During the period under review, the Special Rapporteur on Prisons and Conditions of Detention in Africa, Commissioner Vera Mlangazuwa Chirwa, undertook visits to prisons and places of detention in Cameroon from 1st to 14th September 2002 and Benin from 23rd January to 5th February 2003. The Mission to Benin was a follow up to the mission undertaken by former Special Rapporteur on Prisons and Conditions of Detention in Africa, Professor Dankwa in August 1999;
26. The Special Rapporteur on Prisons and Conditions of Detention in Africa also carried out the following activities during the period under review -:
- Participated in the 2nd Pan African Conference on Penal and Prison Reform which was held from 18th to 20th September 2002 in Ouagadougou, Burkina Faso. The Meeting adopted a Declaration and Plan of Action;
 - Attended the Consultative Meeting between the African Commission and the United Nations High Commissioner for Refugees held in Addis Ababa, Ethiopia from 20th to 21st March 2003;
 - Participated in the 2nd Ministerial Conference on Human Rights which was held from 5th to 9th May 2003, in Kigali, Rwanda;
 - Attended a Meeting on the Review of the Prisons Act which took place on 17th February 2003 in Lilongwe, Malawi;

- Addressed a training course on Human Rights for Chiefs in Northern Malawi that was held from 10th to 14th March 2003.

27. Commissioner Vera Chirwa's mandate as a Special Rapporteur on Prisons and Conditions of Detention, which had come to an end, was extended during the 33rd Ordinary Session for a further two years.

(d) Report of the Special Rapporteur on the Rights of Women in Africa

28. During the period under review, the Special Rapporteur on Women's Rights in Africa, Commissioner Angela Melo undertook missions to the following countries in her capacity as the Special Rapporteur -:

Angola – from 27th September to 2nd October 2002

Djibouti – from 14th to 17th September 2002

Sudan – from 30th March to 4th April 2003

29. At the 33rd Ordinary Session, the Special Rapporteur on the Rights of Women presented her programme of work for the period 2003 to 2004 which was considered and adopted by the African Commission on the basis that it will be incorporated into the overall Plan of Work of the African Commission for the period 2003 to 2006.

30. The Special Rapporteur on the Rights of Women in Africa also undertook the following activities during the period under review -:

- Met with Ms Souad Abdenebi of the Economic Community for Africa (ECA) in Maputo, Mozambique;
- Met with the Assistant Resident Representative of the United Nations Development Programme (UNDP) in February 2003 in Maputo, Mozambique. The main objective of the meeting was to establish cooperation between UNDP and the African Commission;
- Held a Meeting with the United Nations Population Fund in March 2003 with a view to establishing cooperation;
- Attended a Seminar on 'Sexual and Reproductive Rights' in February 2003, organised by an NGO known as AMANITARE and held in Johannesburg, South Africa;
- Attended a meeting held in preparation of the Meeting of Experts on the Protocol on the Rights of Women in Africa organised by a South African NGO known as Gender Equality, which was held in February 2003 in Johannesburg, South Africa;
- Attended a Meeting of Governmental Experts and that of Ministers on the Draft Protocol on the Rights of Women in Africa in March 2003 in Addis Ababa, Ethiopia; The text of the Draft Protocol on the Rights of Women was finalised during these Meetings
- Held Meetings in April 2003 in Maputo, Mozambique with several human rights NGOs working in the area of women's rights with the intention of promoting the Draft Protocol on the Rights of Women
- Attended a meeting organised by Femme Africa Solidarité in April 2003 in Dakar, Senegal. The Meeting prepared implementation strategies of the Durban Declaration and Action Plan of June 2002;
- Participated in a Preliminary Meeting of NGOs organised by a Working Group of Women from SADC in preparation of the Maputo Summit of the African Union.

Review of the Special Rapporteur Mechanism

31. At its 28th Ordinary Session, the African Commission resolved to undertake a review of its Special Rapporteur mechanism that had been adopted since 1994. The African Commission thus requested Commissioner Pityana to undertake this task.
32. During the 33rd Ordinary Session of the African Commission, Commissioner Pityana submitted his report on the review of the mechanism of the Special Rapporteur. Following debates on the report, it was shelved for latter consideration.

(e) Seminars and Conferences

33. The Arab Lawyers Union in collaboration with Union Inter-Africaine des Droits de l'Homme (UIDH) and other partners organised a Conference "Beyond the Durban World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance: The Durban World Conference One Year After: Stocktaking Event and the Inaugural Assembly of the Durban World Conference Monitors Group". Commissioner Hatem Ben Salem attended this conference, which took place from 22nd to 26th September 2002, in Cairo, Egypt.
34. AMANITARE, an NGO based in South Africa and working around issues of sexual and reproductive health and rights organised a Pan African Conference entitled "African Women's Sexual and Reproductive Health and Rights Conference: Prosperity Through Empowerment". The Conference took place from 4th to 7th February 2003 in Johannesburg, South Africa. The Special Rapporteur on the Rights of Women in Africa, Commissioner Angela Melo, represented the African Commission at that Conference.
35. During the period under review, the African Centre for Democracy and Human Rights Studies (ACDHRS) in collaboration with the African Commission and other Human Rights NGOs organised an NGO Forum prior to the 32nd and 33rd Sessions to prepare human rights NGOs for participation in the Ordinary Sessions of the African Commission.

The Second Pan-African Conference on Penal and Prison Reform in Africa

36. The First Pan-African Conference on Penal reform and Prison conditions in Africa was held in Kampala, Uganda in September 1996. That Conference brought together, for the first time, a unique combination of role players and stakeholders with a direct or indirect bearing penal and prison reform in Africa. At the end of this Meeting, the participants adopted the ***Kampala Declaration on Prison Conditions in Africa***. This Declaration outlined an agenda for speeding up the process of penal reform in Africa and also set up a range of principles and rules on prison reform on the continent.
37. As a follow up to the First Conference, the Second Pan-African Conference on Penal and Prison Reform in Africa was held from 18th to 20th September 2002 in Ouagadougou, Burkina Faso. The Conference was organised by Penal Reform International, the African Commission and the African Prison Association, under the high patronage of the President of Burkina Faso. The Conference adopted the ***Ouagadougou Declaration on Accelerating Penal Reform in Africa*** and a Plan of Action to implement the aforesaid Declaration.

38. The Chairperson of the African Commission, Commissioner Rezag Bara, Commissioner Sawadogo and the Special Rapporteur on Prisons and Conditions of Detention, Commissioner Vera Chirwa participated in this Second Pan-African Conference on Penal and Prison Reform in Africa.

Indigenous Populations/Communities in Africa

39. The Working Group of Experts on Indigenous People/Communities held its first meeting prior to the 30th Ordinary Session of the African Commission on 12th October 2001 in Banjul, The Gambia. At this meeting, the Working Group agreed on a comprehensive work plan on the activities it would undertake for the period covered by its mandate.

40. As a follow up to this meeting, Members of the Working Group drafted a Conceptual Framework Paper to map out the scope of what the Working Group would be dealing with. This Conceptual Framework Paper was discussed at a Roundtable Meeting that was held before the 31st Ordinary Session of the African Commission on 30th April 2002 in Pretoria, South Africa. Experts on indigenous issues attended this Meeting. The African Commission was represented at this meeting.

41. Following the Roundtable Meeting, the Working Group decided to organise a Consultative Meeting drawing together experts on indigenous issues and representatives of indigenous populations/communities from the continent. This Consultative Meeting would allow the Working Group to test the ideas within the Conceptual Framework Paper with a wider audience. Discussions gathered during this exercise assisted in shaping the Conceptual Framework Paper and also in responding to the questions put by the African Commission to the Working Group. The Consultative Meeting was held from 31st January to 2nd February 2003 in Nairobi, Kenya.

42. Commissioner Barney Pityana presented the Report of the activities of the Working Group during the 33rd Ordinary Session of the African Commission. The Conceptual Framework Paper that was drafted by the Working Group will be presented to the African Commission for adoption at its 34th Ordinary Session.

Consultative Meeting between the African Commission and the United Nations High Commissioner for Refugees (UNHCR)

43. For a long time, the African Commission has had discussions with the UNHCR on how to promote better cooperation between them in order to reinforce joint efforts to promote and protect the rights of refugees and internally displaced persons (IDPs) in Africa.

44. At its 30th Ordinary Session held in Banjul, The Gambia, in October 2001, the UNHCR presented concrete proposals in this regard. The possibility of concluding a Memorandum of Understanding (MoU) was also suggested.

45. As a follow up to the said proposals, during the 31st Ordinary Session held in Pretoria, South Africa, Members of the African Commission held discussions with Officials from the UNHCR Office in South Africa. It was agreed that a Consultative Meeting be organised, during which, the two organisations would discuss possible areas of co-operation.

46. The Consultative Meeting, which was held from 20th to 21st March 2003 in Addis Ababa, Ethiopia. A copy of the report of that Consultative Meeting can be obtained from the Secretariat of the African Commission.
47. During the 33rd Ordinary Session of the African Commission, a Memorandum of Understanding between the African Commission and the UNHCR was signed. **(See Annex IV).**

First African Union Ministerial Conference of Human Rights in Africa

48. The 1st African Union Ministerial Conference of Human Rights is a follow up to the 1st OAU Ministerial Conference on Human Rights, which was held from 12th to 16th April 1999 in Mauritius.
49. In consultation with the Secretariat of the African Commission on Human and Peoples' Rights, the Commission of the African Union embarked on the preparations of the 1st African Union Ministerial Conference on Human Rights, which was held from **5th to 9th May 2003 in Kigali, Rwanda**. The African Commission was represented at this Conference.
50. The 1st African Union Ministerial Conference on Human Rights evaluated the status of implementation of the Grand Bay (Mauritius) Declaration and Plan of Action and was able to come up with strategies aimed at better ensuring the promotion and protection of human rights in Africa. The Ministerial Conference adopted the Kigali Declaration.
51. The 1st African Union Ministerial Conference was preceded by a preparatory forum of African Human Rights Institutions and NGOs, which was held in Nairobi, Kenya from 2nd to 3rd May 2003. Recommendations arising out of this forum formed part of the contribution to the Ministerial Conference.

Seminars and Conferences to be organised under the auspices of the African Commission

52. In accordance with the Mauritius Plan of Action 1996-2001, the African Commission resolved to organise a number of Seminars and Conferences. **(See Annex V).**
53. Arrangements are already underway to organise the Seminar on *Economic, Social and Cultural Rights* which is presently scheduled to take place from **20th to 24th September 2003 in Cairo, Egypt**. Arrangements are also underway to organise the Seminar on the *Situation of Refugees and Internally Displaced Persons in Africa*.
54. However, on the whole, the African Commission has been unable to organise all the Seminars that were planned and hereby seeks the support of Member States, International Organisations and NGOs in undertaking this activity.

D. Process of preparation of the Draft Protocol to the African Charter on the Rights of Women in Africa

55. The process of drafting a Protocol to the African Charter on Human and Peoples' Rights in order to protect the specific rights of women in Africa began way back in the 1990s when during several meetings and seminars, human rights activists pointed out that

substantially the African Charter was lacking in its protection of the rights of women in Africa.

56. At the insistence of various partners, the African Commission in 1998, appointed a Special Rapporteur on the Rights of Women in Africa, whose mandate included *inter alia* follow up on the drafting of a Protocol to the African Charter on the Rights of Women in Africa through to its adoption by the African Union.
57. Subsequently, with the assistance of NGOs and a Working Group which was established for that purpose, a draft of the Protocol on the Rights of Women was presented to the 26th Ordinary Session of the African Commission in November 1999 for adoption. Following its adoption by the African Commission at that session, the Draft Protocol was transmitted to the then OAU General Secretariat for the requisite process.
58. Consequently, the OAU General Secretariat convened a first Meeting of Experts to discuss the draft document from 12th to 16th November 2001 and a second Meeting of Experts which was held from 24th to 26th March 2003 in Addis Ababa, Ethiopia. The draft document was discussed and adopted at the Ministerial meeting which was held from 27th to 28th March 2003 in Addis Ababa, Ethiopia. It is expected that the draft Protocol on the Rights of Women will be submitted for adoption at the Assembly of Heads of State and Government of the African Union during its forthcoming Summit scheduled to take place in July 2003 in Maputo, Mozambique.

E. Ratification of Protocol to the African Charter on Human and Peoples' Rights on the Establishment African Court on Human and Peoples' Rights

59. The African Commission, at its 32nd and 33rd Ordinary Sessions, expressed concern over the delay in ratification of the above-mentioned Protocol. Since the Protocol was adopted in June 1998 by the 34th Ordinary Session of the Assembly of Heads of States and Governments of the OAU in Burkina Faso, only nine (9) Member States have ratified the Protocol and deposited their instruments of ratification with the Commission of the African Union. They are Burkina Faso, Côte d'Ivoire, Mali, Mauritius, Senegal, South Africa, The Gambia, Rwanda and Uganda. Six (6) instruments of ratification are still required in order for the Protocol to come into force. The African Commission urged States Parties that had not yet done so, to ratify the said Protocol and called upon human rights organisations to encourage States Parties to quickly ratify this important instrument.

F. Adoption of Resolutions

60. At its 32nd Ordinary Session, the African Commission adopted the following Resolutions:
 - Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa;
 - Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa;

The texts of these resolutions are contained in **Annex V** of this report.

61. The African Commission adopted the Guidelines on the Right to Fair Trial and Legal Aid in Africa at its 33rd Ordinary Session.

62. The texts of the following documents are available at the Secretariat of the African Commission. They can also be found on the Website of the African Commission -:
- Declaration of Principles on Freedom of Expression in Africa,
 - Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa and
 - Guidelines on the Right to Fair Trial and Legal Aid in Africa

G. Relations with observers

63. At its 32nd and 33rd Ordinary Sessions the African Commission deliberated further on its co-operation with National Human Rights Institutions and NGOs. The matter remains on the Agenda of the African Commission.

64. At its 32nd and 33rd Ordinary Sessions, the African Commission granted Affiliate Status to the following National Human Rights Institutions -:

- South African Human Rights Commission;
- National Human Rights Commission of Nigeria; and
- Commission Nationale Consultative pour la Promotion et la Protection des Droits de l'Homme (Algeria)

This brings to thirteen (13) the number of National Human Rights Institutions to which the African Commission has granted affiliate status.

65. The African Commission reiterated its appeal to States Parties to create National Human Rights Institutions and strengthen the capacities of those already in existence.

66. At its 32nd and 33rd Ordinary Sessions, the African Commission granted Observer Status to the following NGOs -:

- Community Law and Development Centre (South Africa);
- Malawi Centre for Advice, Research and Education on Rights (Malawi);
- Association pour les Droits de l'Homme en Milieu Carcéral (Congo-Brazzaville);
- Human Rights Trust of Southern Africa (Zimbabwe);
- Collectif des Organisations des Jeunes Solidaires du Congo – Kinshasa (Democratic Republic of Congo);
- Child Rights Watch (Sudan);
- Sudan National Committee on Traditional Practices (Sudan);
- Institute for Democracy in South Africa (South Africa);
- Centre for Rights and Development (Seychelles);
- West Africa Network for Peace-building (Ghana);
- SOS Femmes (Mauritius);
- Equality Now – Africa Regional Office (Kenya);
- Media Institute of Southern Africa (Namibia) ;
- Manyoito Pastoralist Integrated Development Organisation (Kenya);
- Centre for Minority Rights Development (Kenya);
- National Association of Democratic Lawyers (Ghana)
- Media Foundation for West Africa (Ghana);
- Centre Africain des Femmes dans les Media (Sénégal);
- Démocratie Vivante (Niger);
- Mahatma Ghandi Human Rights Organisation (Hungary);
- Organisation pour la Promotion et l'Epanouissement de la Femme Nigérienne (Niger);
- Réseau des Journalistes pour les Droits de l'Homme (Niger);

- Indigenous Peoples' Association Coordinating Committee (South Africa);
- Santé de la Reproduction pour une Maternité sans Risques (Niger);
- International Rehabilitation Council for Torture Victims (Denmark);
- Shelter for Children (Gambia);
- Centre on Housing Rights and Evictions (Geneva)

This brings the total number of NGOs granted Observer Status with the African Commission to three hundred (300) as at 30th May 2003.

H. Protection Activities

67. At its 32nd Ordinary Session the African Commission considered twenty one (21) communications, twelve (12) of which were considered for seizure, five (5) for admissibility and four (4) on merits. Consideration of the ten (10) other communications were deferred to the 33rd Session for reason of lack of time.
68. At its 33rd Ordinary Session, the African Commission considered forty six (46) communications, fourteen (14) of which were considered for seizure, twenty two (22) on admissibility and ten (10) on the merits.
69. The African Commission delivered decisions on the merits on four (4) communications, declared three (3) communications inadmissible and postponed one communication *sine die*. At the request of the Complainants, three (3) communications (2 on admissibility and 1 on seizure) were withdrawn. The African Commission was seized of eleven (11) communications and deferred being seized of two (2) communications to the 34th Ordinary Session.

The decisions on communications adopted by the African Commission are contained in **Annex VII** of the report.

I. Administrative and Financial Matters

70. The Secretary to the African Commission distributed his report on the administrative and financial situation of the Secretariat of the African Commission. However, due to lack of time, the African Commission did not discuss the said report.

J. Adoption of the 16th Annual Activity Report by the Assembly of Heads of State and Government of the African Union

71. The Assembly of Heads of State and Government of the African Union, after due consideration, adopted the 16th Annual Activity Report by a decision in which it expressed its satisfaction with the Report and authorised its publication.

LIST OF ANNEXES

- Annex I** **Agenda of the 32nd Ordinary Session (17th to 23rd October 2002, Banjul, The Gambia)**
- Agenda of the 33rd Ordinary Session (15th to 29th May 2003, Niamey, Niger)**
- Annex II** **Status of Submission of State Periodic Reports to the African Commission on Human and Peoples' Rights (as at May 2003)**
- Annex III** **Distribution of State Parties among Members of the African Commission**
- Annex IV** **Memorandum of Understanding Between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees**
- Annex V** **List of Seminars and Conferences to be organised by the African Commission**
- Annex VI** **Resolutions adopted during the 32nd and 33rd Ordinary Sessions**
- Annex VII** **Decisions on Communications brought before the African Commission and adopted during the 32nd and 33rd Ordinary Sessions**

Annex I

*Agenda Of The 32nd Ordinary Session
17th to 23rd October 2002,
Banjul, The Gambia*

*Agenda Of The 33rd Ordinary Session
15th to 29th May 2003,
Niamey, Niger*

**AGENDA OF THE 32nd ORDINARY SESSION OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS
17th – 23rd October 2002, Banjul, The Gambia**

Item 1: Opening Ceremony (Public Session)

Item 2: Adoption of the Agenda (Private Session)

Item 3: Organisation of Work (Private Session)

Item 4: Adoption (Private Session):

- **The Report of the 31st Ordinary Session**
- **Concluding Observations to:**
 1. The Initial Report of Mauritania;
 2. The Initial Report of Lesotho;
 3. The Initial Report of Cameroon; and
 4. The Periodic Report of Togo.

Item 5: Observers (Public Session)

- a) Statements by State Delegates and Guests;
- b) Co-operation between the Commission and the National Human Rights Institutions;
 - Consideration of applications for Affiliate Status;
- c) Relationship and Co-operation between the Commission and NGOs;
 - Consideration of applications for Observer Status;

Item 6: Human Rights Situation in Africa (Public Session)

Item 7: Protection Activities (Private Session)

- Consideration of (some of the) Communications;

Item 8: Adoption of Resolutions, Recommendations and Decisions including
(Private Session):

Guidelines on -:

1. Freedom of Expression in Africa; and
2. Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa;

Item 9: Dates, Venue and Draft Agenda of the 33rd Ordinary Session (Private Session)

Item 10: Any Other Business (Private Session)

Item 11: Preparation and Adoption of the Session Report and the Final Communiqué of the 32nd Ordinary Session (Private Session)

Item 12: Reading of the Final Communiqué and Closing Ceremony (Public Session)

Item 13: Press Conference (Public Session)

**AGENDA OF THE 33rd ORDINARY SESSION OF THE AFRICAN
COMMISSION ON HUMAN AND PEOPLES' RIGHTS
15-29 May 2003, Niamey, Niger**

Item 1: Opening Ceremony (Public Session)

Item 2: Adoption of the Agenda (Private Session)

Item 3: Organisation of Work (Private Session)

Item 4: Adoption of the Draft Report of the 32nd Ordinary Session (Private Session)

Item 5: Observers (Public Session)

- a) Statements by State Delegates and Guests;
- b) Consideration of applications of National Human Rights Institutions for Affiliate Status with the ACHPR;
- c) Consideration of applications of NGOs for Observer Status with the ACHPR

Item 6: Consideration of State Reports (Public Session):

- The Status of Submission of States Reports;
- The Initial Report of the Democratic Republic Congo;
- The Initial Report of the Saharawi Arab Democratic Republic

Item 7: Promotion Activities (Public Session)

- a) Reports of the Activities of the Chairman and Members of the Commission;
- b) Consideration of the Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa;
- c) Consideration of the Report of the Special Rapporteur on the Rights of Women in Africa;
- d) Organisation of Conferences and Seminars;

Item 8: Substantive Issues in the Implementation of the Charter (Public Session)

- a) Human Rights Situation in Africa;
- b) The Situation of Human Rights Defenders in Africa;
- c) The Situation of Indigenous Populations/Communities in Africa;
- d) The Situation of Refugees and Displaced Persons in Africa;
- e) The African Commission and the proposed African Court on Human and Peoples' Rights: the Strategies for the ratification of the Protocol to the African Charter on the Establishment of the African Court on Human and Peoples' Rights
- f) The African Commission on Human and Peoples' Rights and the African Union, including NEPAD and the Conference for Security, Stability, Development and Cooperation in Africa (CSSDCA);
- g) The 2nd Ministerial Conference on Human Rights in Africa
- h) The Declaration and Plan of Action of the Pan-African Conference on Prison and Penal reform in Africa held in Ouagadougou, Burkina Faso, 18th to 20th September 2002;

Item 9: Protection Activities (Private Session)

- Consideration of Communications;

Item 10: Adoption of (Private Session):

- The Draft Report on the Fact-Finding Mission to Zimbabwe
- The Draft Reports on the Promotional Missions to Cote d'Ivoire, South Africa, Burkina Faso and Zambia
- The Draft Reports on the Missions of the Special Rapporteur on Prisons and Conditions of Detention in Africa to Namibia and Uganda
- The Draft Guidelines on the Right to Fair Trial and Legal Aid in Africa
- Memorandum of Understanding between the African Commission on Human and Peoples' Rights and the United Nations High Commissioner for Refugees

Item 11: Administrative and Financial Matters (Private Session)

- a) Formal Adoption of the Strategic Plan of the African Commission, 2003 – 2006;
- b) Administrative and Financial Situation of the Secretariat;
- c) Construction of the Headquarters of the Commission;

Item 12: Methods of Work of the Commission (Private Session)

- a) Consideration of the Draft Code of Conduct for Commissioners;
- b) Functioning of the System of Special Rapporteurs of the African Commission;
 - Nomination of the Special Rapporteur on Prisons and Conditions of Detention in Africa (Private Session)
- c) Review of the Procedures the ACHPR: information on the Consultants' work;
- d) Follow up on the resolutions on the Right to freedom of Expression and Prevention of Torture.

Item 13: Adoption of Recommendations, Decisions, and Resolutions including (Private Session):

- Concluding Observations on the Initial Reports of:
 - i. The Democratic Republic of Congo;
 - ii. The Saharawi Arab Democratic Republic.

Item 14: Date, Venue and Draft Agenda of the 34th Ordinary Session (Private Session)

Item 15: Any Other Business (Private Session)

Item 16: Preparation and Adoption of the Session Report and the Final Communiqué of the 32nd Ordinary Session (Private Session)

Item 17: Adoption of the Session Report, the 16th Annual Activity Report, and the Final Communiqué (Private Session)

Item 18: Reading of the Final Communiqué and Closing Ceremony (Public Session)

Item 19: Press Conference (Public Session)

Annex II

*Status of Submission of Initial & State Periodic Reports
to the African Commission on
Human and Peoples' Rights
(As at May 2003)*

Annex III

Distribution of State Parties among Members of the African Commission

Annex IV

Memorandum of Understanding between the African Commission on Human and Peoples, Rights and the United Nations High Commissioner for Refugees

MEMORANDUM OF UNDERSTANDING BETWEEN
THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
AND
THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

PREAMBLE

The African Commission on Human and Peoples' Rights, hereinafter referred to as "African Commission", and the United Nations High Commissioner for Refugees, hereinafter referred to as "UNHCR";

Considering the 1950 Statute of the United Nations High Commissioner for Refugees, which mandates the High Commissioner with the responsibility of providing international protection to refugees and of seeking permanent solutions for their problems;

Recognising that the 1969 OAU Convention Governing the Specific Aspects of Refugees Problems in Africa plays a fundamental role as the regional framework for the protection of refugees' rights, as well as the effective regional complement to the 1951 UN Convention Related to the Status of Refugees;

Recalling the 1981 African Charter on Human and Peoples' Rights, which entrusts the African Commission with a treaty monitoring function and a mandate to promote and protect human and peoples' rights, including the right of every individual, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions;

Recalling the 1990 Agreement signed between the OAU and the United Nations System (UN System), encouraging co-operation between the OAU and the UN System and its relevant Specialised Agencies;

Having regard to the Co-operation Agreement concluded on 13th June 1969, as amended by the Co-operation Agreement of 9 April 2001, which defines the spheres and framework of co-operation between the Organisation of African Unity (OAU) and UNHCR;

Noting that the OAU/UNHCR Meeting of Government and Non-Government Technical Experts held in Conakry, Guinea, in March 2000, to commemorate the 30th Anniversary of the 1969 OAU Convention adopted a Comprehensive Implementation Plan (CIP) aimed at ensuring the effective protection of refugees, asylum seekers and returnees in Africa, as well as the identification of durable solutions to the refugee problem;

Noting further that the CIP was endorsed by the 72nd Session of the OAU Council of Ministers meeting in Lome, Togo, and by the Assembly of Heads of State and Government of Member States of the OAU at their 37th Session in Lusaka, Zambia from 9th to 11th July 2001;

Desirous of strengthening co-operation between the African Commission and UNHCR, as mandated in Action 15 of the Comprehensive Implementation Plan (CIP), with the aim of more

effectively promoting and protecting the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates;

HAVE AGREED as follows:

ARTICLE I

Objective

The objective of this Memorandum of Understanding is to strengthen co-operation between the African Commission and UNHCR, with the aim of more effectively promoting and protecting the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates.

ARTICLE II

Areas of Co-operation

UNHCR and the African Commission shall co-operate in the following areas:-

1. Share relevant information relating to the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates;
2. Jointly promote dissemination, awareness of, and training in international human rights, refugee and humanitarian law;
3. Undertake joint research and publications with emphasis on the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates, including comparative studies on the experience of human rights monitoring bodies in different continents, in order to identify and promote best practices aimed at enhancing refugee protection in Africa;
4. Support and promote the use of the different procedures and mechanisms available within the African Commission, such as missions, submission of communications, State reporting procedures and Special Rapporteurs, to address violations of the rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates;
5. Undertake joint actions to encourage African States to implement Resolutions, Recommendations and Decisions relevant to refugees, asylum seekers, returnees and other persons of concern under their respective mandates, adopted by the African Commission;
6. Pursuant to Article 60 of the African Charter, draw inspiration from the Resolutions, Recommendations and Decisions of the United Nations Human Rights Treaty Monitoring and Charter-Based Bodies, the Executive Committee of UNHCR and the relevant Organs of the African Union, in undertaking joint actions with the aim of more effectively promoting and protecting the human rights of refugees, asylum seekers, returnees and other persons of concern under their respective mandates;
7. Encourage closer co-operation between the African Commission, UNHCR and the relevant organs of the African Union, such as the Commission on Refugees and the Division for Humanitarian Affairs, Refugees and Displaced Persons, with a view to exchanging reports and fostering the complementarity of their respective mandates;
8. Maintain regular communication in order to identify other areas of co-operation and mutual interest.

ARTICLE III

Modalities for implementation

1. The Parties shall establish such procedures and mechanisms as deemed appropriate for the development and implementation of strategies, programmes and activities necessary to attain the objectives of this Memorandum of Understanding.
2. Either Party shall participate at meetings convened by the other upon invitation.
3. UNHCR and the African Commission shall exchange information, studies, reports, databases and documents on matters of mutual interest, and shall collaborate in the collection, analysis and dissemination thereof, subject to such arrangements as may be necessary to safeguard the confidentiality and restricted character of such documents and information.
4. The Africa Bureau at UNHCR Headquarters and the Secretariat of the African Commission shall, in close cooperation with the UNHCR's Regional Liaison Office in Addis Ababa and with the Division of Humanitarian Affairs, Refugees and Displaced Persons of the African Union, co-ordinate activities aimed at implementing this Memorandum of Understanding.

ARTICLE IV

Financial provision

Each Party is responsible for mobilising the resources necessary to implement the activities set out in this Memorandum of Understanding. Should sufficient resources not be available for immediate action by one Party, the other shall be consulted. The parties shall explore the possibility of joint mobilisation of resources in relation to specific activities.

ARTICLE V

Resolution of disputes

Any dispute arising from the interpretation or application of this Memorandum of Understanding shall be settled by mutual agreement between the two Parties, with a view always to ensuring its successful realisation.

ARTICLE VI

Amendments

This Memorandum of Understanding may only be amended by mutual written consent between the Parties.

ARTICLE VII

Termination

Either Party may terminate this Memorandum of Understanding by giving notice to the other Party of its intention to do so. Such termination shall become effective ninety days from the date of receipt of such notification by the other Party. The Parties shall consult to ensure that any ongoing activities are not affected by such termination.

ARTICLE VIII

Entry into force

This Memorandum of Understanding shall enter into force upon signature and shall remain in force unless terminated under the provisions of Article VII hereof.

IN FAITH WHEREOF, the undersigned, being duly authorised for this purpose by the respective Parties hereto, have signed the two original copies of this Memorandum of Understanding drawn up in the English and French languages.

**For the African Commission
on Human and Peoples' Rights**

**For the United Nations
High Commissioner for
Refugees**

Name.....

Name.....

Title.....

Title.....

Date.....

Date.....

Annex V

List of Seminars and Conferences to be organised by the African Commission

ORGANISATION OF SEMINARS AND CONFERENCES

In accordance with the Mauritius Plan of Action 1996-2001, the Commission resolved to organise the following Seminars as a matter of priority over the period covered by the Plan of Action -:

1. Comparison of the African Charter Protection System with other regional systems
2. The setting up in the African Commission of a Mechanism of Country Rapporteurs and Rapporteurs for main themes
3. Freedom of Expression, Association and Assembly in Africa
4. Economic, Social and Cultural Rights; The respect by States Parties of obligations defined in the African Charter
5. Relevance of Peoples' Rights in the African Charter, especially the right to development, the right to have a clean and safe environment, peace, security and the right to self determination
6. The Rights of the Child in Africa
7. Freedom of Movement and the right to Asylum in Africa
8. Claw back Clauses in the African Charter
9. The African Commission and the National structures for the protection and promotion of human and peoples' rights
10. Ethnic Conflict Resolution in a human rights context
11. The problem of Mass Expulsions in Africa

It should be noted however, that the African Commission has largely been unable to organise all the above Seminars as envisaged in the Plan of Action. The African Commission in its Strategic Plan of 2002 to 2006 has thus retained these Seminars as part of the activities it hopes to carry out during the stated period and hereby appeals to various NGOs and Institutions to collaborate with it in the organisation of the abovementioned Seminars.

In addition to the abovementioned Seminars and Conferences, other suggested Seminars and Conferences were -:

1. Peaceful Settlement of Ethnic and Social Conflicts from a Human Rights Perspective
2. Contemporary Forms of Slavery in Africa
3. The Right to Education, Popular Participation and non formal Education: An Essential Condition for Development in Africa
4. The Rights of Persons with Disabilities
5. Prevention of Torture
6. The Situation of Refugees and Internally Displaced Persons
7. The Right to a Fair Trial and Legal Aid in Africa
8. Right to Freedom of Expression and the African Charter

So far the African Commission has successfully organised the following Seminars -:

- Freedom of Expression and the African Charter
- Prevention of Torture
- The Right to Fair Trial and Legal Aid in Africa

Annex VI

Resolutions Adopted During The 32nd Ordinary Session

- *Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa;*
- *Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa;*

Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa

The African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17th to 23rd October 2002;

Reaffirming the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms;

Concerned at violations of these rights by States Party to the Charter;

Taking into consideration the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press, the Final Report of the African Conference of "The Journalist and Human Rights in Africa" held in Tunis, Tunisia from 31st October to 1st November 1992, the Resolution on Freedom of Expression adopted by the African Commission on Human and Peoples' Rights in Tripoli on 7th May 2001, the Statement of the Seminar on "Freedom of Expression and the African Charter" held from 23rd to 25th November 2000 in Johannesburg, South Africa and the first and second meetings of the Commission's Working Group on Freedom of Expression held in Cape town, South Africa from 10th to 11th February 2002 and in Pretoria, South Africa on 1st May 2002 respectively;

Decides to adopt and to recommend to African States the Declaration of Principles on Freedom of Expression in Africa annexed hereto;

Decides to follow up on the implementation of this Declaration.

Done in Banjul, The Gambia on the 23rd October 2002

Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

The African Commission on Human and Peoples' Rights, meeting at its 32nd ordinary session, held in Banjul, The Gambia, from 17th to 23rd October 2002;

Recalling the provisions of -:

- Article 5 of the African Charter on Human and Peoples' Rights that prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment;
- Article 45 (1) of the African Charter which mandates the African Commission to, inter alia, formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations;
- Articles 3 and 4 of the Constitutive Act of the African Union wherein States Parties undertake to promote and respect the sanctity of human life, rule of law, good governance and democratic principles;

Recalling further its Resolution on the Right to Recourse Procedure and Fair Trial adopted during its 11th ordinary session, held in Tunis, Tunisia, from 2nd to 9th March 1992;

Noting the commitment of African States to ensure better promotion and respect of human rights on the continent as reaffirmed in the Grand Bay Declaration and Plan of Action adopted by the 1st Ministerial Conference on Human Rights in Africa;

Recognising the need to take concrete measures to further the implementation of existing provisions on the prohibition of torture and cruel, inhuman or degrading treatment or punishment;

Mindful of the need to assist African States to meet their international obligations in this regard;

Recalling the recommendations of the *Workshop on the Prohibition and the Prevention of Torture and Ill-treatment*, organised jointly by the African Commission and the Association for the Prevention of Torture, on Robben Island, South Africa, from 12th to 14th February 2002;

1. **Adopts** the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines).
2. **Establishes** a Follow-up Committee comprising of the African Commission, the Association for the Prevention of Torture and any prominent African Experts as the Commission may determine.
3. **Assigns** the following mandate to the Follow-up Committee -:
 - To organise, with the support of interested partners, seminars to disseminate the Robben Island Guidelines to national and regional stakeholders.
 - To develop and propose to the African Commission strategies to promote and implement the Robben Island Guidelines at the national and regional levels.

- To promote and facilitate the implementation of the Robben Island Guidelines within Member States.
 - To make a progress report to the African Commission at each ordinary session.
4. **Urges** Special Rapporteurs and Members of the African Commission to widely disseminate the Robben Island Guidelines as part of their promotional mandate.
 5. **Encourages** States parties to the African Charter, in their periodic reports to the African Commission, to bear in mind the Robben Island Guidelines.
 6. **Invites** NGOs and other relevant actors to widely disseminate and utilise the Robben Island Guidelines in the course of their work.

Annex VII

Decisions On Communications Brought Before The African Commission

Decisions adopted at the 33rd Ordinary Session of the African Commission

Decisions on the Merits

1. Consolidated Communication 222/98 and 229/98 - The Law Offices of Ghazi Suleiman/Sudan
2. Communication 228/99 - The Law Offices of Ghazi Suleiman/Sudan
3. Communication 236/2000 - Curtis Francis Doebbler/Sudan
4. Communication 241/2001 - Purohit and Moore/The Gambia

Communication Postponed *sine die*

Consolidated Communication 233/99 – Interights (on behalf of the Pan African Movement and Citizens for Peace in Eritrea)/Ethiopia and 234/99 – Interights (on behalf of the Pan African Movement and Inter-Africa Group)/Eritrea

Communications declared inadmissible

1. Communication 247/2002 – Institute for Human Rights and Development (on behalf of Jean Simbarakiye)/Democratic Republic of Congo
2. Communication 252/2002 - Stephen Aigbe/Nigeria
3. Communication 254/2002 - Mouvement des Réfugiés Mauritanien au Senegal Pour la Defense des Droits de l'Homme/Senegal

Communications withdrawn by the Complainants

1. Communication 244/2001 – Arab Human Rights Organisation/Egypt
2. Communication 261/2002 – Interights et al/Egypt

DECISIONS ON THE MERITS

Rapporteur:

24th ordinary session: Commissioner Pityana
25th ordinary session: Commissioner Pityana
26th ordinary session: Commissioner Pityana
27th ordinary session: Commissioner Pityana
28th ordinary session: Commissioner Pityana
29th ordinary session: Commissioner Pityana
30th ordinary session: Commissioner Pityana
31st ordinary session: Commissioner Pityana
32nd ordinary session:
33rd ordinary session: Commissioner Dankwa

Summary of facts

1. Communication 222/98 was submitted by Law Office of Ghazi Suleiman, a law firm based in Khartoum, Sudan, on behalf of Abdulrhaman Abd Allah Abdulrhaman Nugdalla (unemployed), Adb Elmahmoud Abu Ibrahim (religious figure) and Gabriel Matong Ding (engineer).
2. It is alleged that the three persons were put in jail and the necessary investigations carried out in accordance with the 1994 law relating to national security. The acts of these persons had terrorist and propaganda objectives aimed at endangering the security and peace of the country and innocent civilians.
3. The Complainant alleges that these individuals were arrested on 1st July 1998 or around this date and that they were detained by the Government of Sudan without charge and were refused contact with their lawyers or their families.
4. He adds that their lawyers requested, in vain, the competent authorities, including the Supreme Court (Constitutional Division), authorisation to visit their clients. The last of these requests was rejected on 5th August 1998. There are reasons to believe that these detainees are subjected to torture.
5. The same Law Office of Ghazi Suleiman submitted a similar communication 229/99 on behalf of 26 civilians. These are civilians being tried under a military court, accused of offences of destabilizing the constitutional system, inciting people to war or engaging in the war against the State, inciting opposition against the Government and abetting criminal or terrorist organisation under the law of Sudan.
6. It is alleged that this court was established by Presidential decree and that it is mainly composed of military officers. Of the four members of the court, three are active servicemen. The communication adds that the court is empowered to make its own rules of procedure which does not have to conform to the established rules of fair trial.
7. The Complainant claims also that all these suspects were refused the right to assistance of defenders of their choice and sufficient time and access to their files with a view to preparing their defense. Violation of the right to defense by lawyers of their choice is allegedly based on the judgment delivered by the military court on 11th October 1998 with a view to preventing the lawyers chosen by the accused to represent them. Mr. Ghazi

Suleiman, main shareholder of the complaining law firm, is one of these lawyers. It is also reported that the decisions of this court are not subject to appeal.

Provisions the African Charter allegedly violated

8. The Complainant alleges that Articles 5, 6 and 7(a), (b), (c) and (d) of the African Charter have been violated.

Procedure

9. The communication was received at the Secretariat on 28th September 1998.
10. During its 25th Ordinary Session held from 26th April to 5th May 1999 in Bujumbura, Burundi, the African Commission decided to consider the communication.
11. On 11th May 1999, the Secretariat of the African Commission notified the two parties of this decision.
12. The African Commission considered the communication during its 26th ordinary session held in Kigali, Rwanda, from 1st to 15th November 1999 and requested the Complainant to submit in writing his comments on the issue of exhaustion of local remedies. Furthermore, it requested the parties to provide it with the relevant legislation and court decisions (in English or French).
13. On 21st January 2000, the Secretariat of the African Commission wrote to the parties informing them of the decision of the African Commission.
14. During its 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission heard the oral submissions of the parties and decided to consolidate all the communications brought against Sudan. The African Commission requested the parties to provide their written submission on the issues of exhaustion of local remedies.
15. On 30th June 2000, these decisions were communicated to the parties.
16. At the 28th Ordinary Session held from 23rd October to 6th November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this case to the 29th Ordinary Session and requested the Secretariat to incorporate the oral submissions of the State delegate and the written submissions of the Counsel into the draft decision to enable the African Commission take a reasoned decision on admissibility.
17. During the 29th Ordinary Session held in Tripoli, Libya, 23rd April to 7th May 2001, the African Commission heard the parties on the case. Following detailed discussions, the African Commission noted that the Complainant had submitted a comprehensive dossier on the case. It was therefore recommended that consideration of the communication be deferred to the 30th ordinary session, pending the submission of detailed replies of the Respondent State.
18. On 19th June 2001, the Secretariat of the African Commission informed the parties of the above mentioned decision and requested the Respondent State to send its written

submissions within two months from the date of notification of the African Commission's decision.

19. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the Respondent State and Dr Curtis Doebler presented their oral submissions. The African Commission decided to defer consideration of these communications to the 31st Ordinary Session and requested the Government of Sudan to reply to the Complainant's submissions.
20. On 15th November 2001, the Secretariat of the African Commission informed the parties of the decision of the African Commission and requested the Respondent State to submit its written comments within two months from the date of the notification of the said decision.
21. During its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission heard oral submissions from the two parties and declared the communication admissible. The African Commission also decided to consolidate communications 222/98 and 229/99 due to the similarity of the allegations.
22. On 29th May 2002, the Respondent State and the Complainants were informed of the decision adopted by the African Commission.
23. At the 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the representative of the Respondent State made oral and written submissions requesting the African Commission to review its decision on admissibility relating to all the communications brought by the Complainant against the government of Sudan. The African Commission informed the Respondent State that the issue of admissibility of the communications had been settled and that the Respondent State should submit its arguments on the merits.
24. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

Submissions of the Complainant

25. The Complainant informed the African Commission that the victims were released at the end of 1999 following the pardon granted by the President of Sudan. When they were released, the Government announced that the case was closed and that no other legal proceedings could or would be initiated. The pardon was granted on condition that the victims renounce their right to appeal.
26. The Complainant informed the African Commission that there exists no effective means of obtaining redress, and that even when an appeal is made to the Constitutional Court, this has no effect because of the state of emergency in force. He added that lack of appropriate means of obtaining redress is a result of political restrictions which prevent its implementation.

Submissions of the Respondent State

27. In its written submissions, the Respondent State stresses that the acts committed by the accused amounted to a terrorist crime endangering national peace and security. Considering the cruel nature of the crime characterised by the use of lethal weapons and given that these crimes are provided for in Parts 5, 6 and 7 of the 1991 criminal code of Sudan, the accused were judged by a military court in conformity with the 1986 law relating to the peoples' armed forces, following the assent of the Minister of Justice as applied for by the military authorities under the law. The court's sessions were open to the public and the accused were treated in accordance with the law which guarantees them the right to fair trial. They exercised their right to freely choose their legal counsel. The legal counsel was composed of nine prominent names from the Sudanese Bar, presided by Abel Alaire Esq., former Vice President of the Republic of Sudan.
28. The defense counsel submitted an appeal to the Constitutional Court, thus suspending the course of military proceedings. The Constitutional Court delivered a final judgment rendering void the decision of the military court.
29. The President of the Republic then pardoned the accused in this criminal case so as to promote national harmony and peace to which Sudan has always aspired, and prepare a climate of understanding and comprehensive peace. In the light of this Presidential proclamation, the Minister of Justice instructed that the legal proceedings be discontinued and that the accused to be released immediately.
30. The pardon was published in the media and neither the declaration of the President of the Republic nor the decision of the Minister of Justice expressly states the condition prohibiting the accused from appealing to the courts or that they should renounce any of their rights.
31. The Respondent State is convinced that the Government of Sudan, has, in all the procedures, complied with the provisions of the African Charter on Human and Peoples' Rights as well as the principles of International Law on Human Rights.

**Law
Admissibility**

32. The admissibility of the communications submitted in conformity with Article 55 of the Charter is governed by the conditions set out in Article 56 of the same Charter. The applicable provision in this particular case is Article 56(5) which 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..."
33. The case under consideration is a consolidation of two communications with similar allegations.
34. In his oral submissions, the delegate of the State informed the African Commission that after the adoption of the new 1998 Constitution, the political situation in Sudan was marked by important political developments which were characterised by the return to Sudan of many opposition figures and leaders of political parties living abroad, and these could go about their political activities in the country in a climate of peaceful coexistence, freedom, pardon and dialogue with a view to building the unity of Sudan. During this period, Sudan was distinguished by its respect and commitment to the United Nations Charter and the OAU Charter in its relations with neighbouring States, and it was able to

re-establish relations with a view to realizing cooperation and trust so as to strengthen African unity and solidarity. Following these developments, the State discontinued the legal proceedings against the Complainants. Since then, they exercise their political activities freely and in a climate of forgiveness and brotherhood.

35. The Respondent State insists that the Complainants were allowed access to justice and were not deprived of their right to submit their applications for the protection of their constitutional rights. It considers that the Complainants did enjoy all their rights provided for by Article 9 of the International Covenant on Civil and Political Rights.
36. The Complainant alleges that there are no effective means of obtaining redress because the victims were forced to renounce their right to take legal action against the Government. They were pardoned and released on condition that they renounce their right to claim damages from the Government. By renouncing the right to claim damages, the Complainants had been denied access to domestic remedies but they had not renounced their right to bring the matter before an international body.
37. The Complainant and the Respondent State are in agreement about the fact that the applicants brought an action before the Supreme Court (Constitutional Division) which on 13th August 1998 decided that the 1994 law on national security took precedence over international law on individual's rights, including the African Charter on Human and Peoples' Rights.
38. The Complainant adds that though the applicants were released at a later date, there has been no compensation for violation of their human rights. He affirms on the other hand that the applicants have exhausted all local remedies with regard to compensation for violation of their human rights by the decision of the Supreme Court (Constitutional Division) of 13th August 1998.
39. The African Commission feels that the obligations of the States are of an *erga omnes* nature and do not depend on their citizens. In any case, the fact that the victims were released does not amount to compensation for violation. The African Commission has taken note of the changes introduced by the Government of Sudan with a view to more protection of human rights but wishes to point out that these changes have no effect whatsoever on past acts of violation and that, under its mandate of protection, it must make a ruling on the communications.
40. Supported by its earlier decisions, the African Commission has always treated communications by ruling on the alleged facts at the time of submission of the communication (**See communications 27/89, 46/91 and 99/93 – Organisation Mondiale Contre la Torture et al/Rwanda**). Accordingly, even if the situation has changed for the better allowing the release of the suspects, the position has not changed with regard to the accountability of the Government in terms of the acts of violation committed against human rights.
41. For these reasons, the African Commission declares this communication admissible.

Merits

42. Article 5 of the Charter stipulates that:

“Every 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.”

43. The Complainant alleges that in the two months of their detention, the suspects were imprisoned, tortured and deprived of their rights. They disputed their detention and treatment inflicted on them as being against the international law on human rights and the law of Sudan.
44. Furthermore, detaining individuals without allowing them contact with their families and refusing to inform their families of the fact and place of the detention of these individuals amounts to inhuman treatment both for the detainees and their families.
45. Torture is prohibited by the criminal code of Sudan and the perpetrators are liable to imprisonment for three months or a fine.
46. The African Commission appreciates the Government’s action of taking legal action against those who committed torture but the scope of the measures taken by the Government is not proportional to the magnitude of the abuses. It is important to take preventive measures such as stopping secret detentions, the search for effective solutions in a transparent legal system and continuation of investigations of allegations of torture.
47. Considering that the acts of torture have been recognised by the Respondent State, even though it did not specify whether legal action was taken against those who committed them, the African Commission considers that these acts illustrate the government’s violation of the provisions of Article 5 of the African Charter.
48. Article 6 of the Charter stipulates 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 the law. In particular, no one may be arbitrarily arrested or detained.”
49. Communication 222/98 alleges that the plaintiffs were arrested and detained without being told the reason for their arrest and without charge. The Complainant submits that their arrest was illegal and was not based on the legislation in force in the country and that their detention without access to their lawyers was a violation of the norms which prohibit inhuman and degrading treatment and provide for the right to fair trial.
50. The Respondent State confirms that the detainees submitted their application contesting their arrest and treatment received during their detention. However, the Respondent State indicates that the plaintiffs did not follow the lengthy procedure required for the restoration of their rights and that, accordingly, the court rejected the said application by decision no. M/A/AD/1998. It should be stressed particularly that the Respondent State does not dispute that the victims were arrested without being charged. This is a *prima facie* violation of the right not to be illegally detained as provided for by Article 6 of the African Charter.
51. The Complainant alleges that Article 7(1) of the African Charter was violated, in that it stipulates 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 use;
- (b) The right to be presumed innocent until proven guilty by a competent court or tribunal;
- (c) The right to defense, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.

52. All these provisions are inter-linked and when the right to have one's cause heard is violated, other acts of violations may also be committed such that the detentions become illegal and are detrimental to the proceedings of a fair trial in the proper form.

53. Furthermore, in terms of form, the fact that the decisions of the military court are not subject to appeal and that civilians are brought to a military court constitutes a *de jure* procedural irregularity. Additionally, to prevent the submission of an appeal to competent national courts violates Article 7(1)(a) and increases the risk of not redressing the procedural defects.

54. In the communication under consideration, the Complainant alleges that the victims were declared guilty in public by investigators and highly placed Government officers. It is alleged that the Government organised wide publicity around the case, with a view to convincing the public that there had been an attempted coup and that those who had been arrested were involved in it. The Government showed open hostility towards the victims by declaring that "those responsible for the bombings" will be executed.

55. The Complainant alleges that in order to reconstitute the facts, the military court forced the victims to act as if they were committing crimes by dictating to them what to do and those pictures were filmed and used during the trial. It is claimed that the authorities attested to the guilt of the accused on the basis of these confessions. The African Commission has no proof to show that these officers were the same as those who presided over or were part of the military court that tried the case. These pictures were not presented to the African Commission as proof. In such conditions, the African Commission cannot carry out an investigation on the basis of non-established proof.

56. However, the African Commission condemns the fact that State officers carried out the publicity aimed at declaring the suspects guilty of an offence before a competent court establishes their guilt. Accordingly, the negative publicity by the Government violates the right to be presumed innocent, guaranteed by Article 7(1)(b) of the African Charter.

57. As shown in the summary of facts, the Complainants did not get permission to get assistance from counsel and those who defended them were not given sufficient time nor access to the files to prepare their defense.

58. The victims' lawyer, Ghazi Suleiman, was not authorised to appear before the court and despite several attempts, he was deprived of the right to represent his clients or even contact them.

59. Concerning the issue of the right to defense, Communications 48/90, 50/91, 52/91, 89/93 - *Amnesty International & others/Sudan* are clear on this subject. The African

Commission held in those communications that:- “the right to choose freely one’s counsel is fundamental for the guarantee of a fair trial. To recognise that the court has the right of veto on the choice of a counsel of one’s choice amounts to an unacceptable violation of this right. There should be an objective system of registration of lawyers so that those lawyers so registered are no longer prevented from assisting in given cases. It is essential that the national Bar is an independent organ which regulates the profession of lawyers and that courts do no longer play this role contrary to the right to defense.”

60. Refusing the victims the right to be represented by the lawyer of their choice, Ghazi Suleiman, amounts to a violation of Article 7(1)(c) of the African Charter.
61. It is alleged that the military court which tried the victims was neither competent, independent nor impartial insofar as its members were carefully selected by the Head of State. Some members of the court are active military officers. The Government did not refute this specific allegation, but just declared that the counsels submitted an appeal to the constitutional court, thus suspending the course of military proceedings. The constitutional court delivered a final judgment, rendering void the decision of the military court against the accused.
62. In its Resolution on Nigeria (adopted at the 17th session), the African Commission stated that among the serious and massive acts of violation committed in the country, there was *“the restriction of the independence of the court and the establishment of military courts which had no independence nor rules of procedure to try individuals suspected of being opponents of the military regime”*
63. The Government confirmed the allegations of the Complainants concerning the membership of the military court. It informed the African Commission in its written submissions that the military court had been established by a Presidential decree and that it was mainly composed of military officers; of the four members, three were active servicemen and that the trial had taken place legally.
64. This composition of the military court alone is evidence of impartiality. Civilians appearing before and being tried by a military court presided over by active military officers who are still under military regulations violates the fundamental principles of fair trial. Likewise, depriving the court of qualified staff to ensure its impartiality is detrimental to the right to have one’s cause heard by competent organs.
65. In this regard, it is important to recall the general stand of the African Commission on the question of civilians being tried by military courts. In its Resolution on the right to a fair trial and legal aid in Africa, during the adoption of the Dakar Declaration and Recommendations, the African Commission noted that:- In many African countries, military courts or specialised criminal courts exist side by side with ordinary courts to hear and determine offences of a purely military nature committed by military staff. In carrying out this responsibility, military courts should respect the norms of a fair trial. They should in no case try civilians. Likewise, military courts should not deal with offences which are under the purview of ordinary courts.
66. Additionally, the African Commission considers that the selection of active military officers to play the role of judges violates the provisions of paragraph 10 of the fundamental principles on the independence of the judiciary which stipulates that: *“Individuals selected to carry out the functions of judges should be persons of integrity and competent, with*

adequate legal training and qualifications.” (Communication 224/98 – Media Rights Agenda/Nigeria)

67. Article 7(1)(d) of the Charter requires the court to be impartial. Apart from the character of the membership of this military court, its composition alone gives an appearance, if not, the absence of impartiality, and this therefore constitutes a violation of Article 7(1)(d) of the African Charter.

For these reasons, the African Commission

Finds the Republic of Sudan in violation of the provisions of Articles 5, 6 and 7 (1) of the African Charter;

Urges the Government of Sudan to bring its legislation in conformity with the African Charter;

Requests the Government of Sudan to duly compensate the victims.

***Done at the 33rd ordinary session held in Niamey, Niger,
from 15th to 29th May 2003***

Rapporteur:

- 25th Ordinary Session: Commissioner Pityana
 - 26th Ordinary Session: Commissioner Pityana
 - 27th Ordinary Session: Commissioner Pityana
 - 28th Ordinary Session: Commissioner Pityana
 - 29th Ordinary Session: Commissioner Pityana
 - 30th Ordinary Session: Commissioner Pityana
 - 31st Ordinary Session: Commissioner Pityana
 - 32nd Ordinary Session:
 - 33rd Ordinary Session: Commissioner Pityana
-

Summary of Facts:

1. The Complainant is a Law Firm based in Khartoum, Sudan. The complaint dated 1 January 1999 was received in the Secretariat on 29 January 1999
2. The Complaint is submitted on behalf of Mr. Ghazi Suleiman, the principal partner in the Law Firm of Ghazi Suleiman.
3. The Complainant alleges that Mr. Ghazi Suleiman was invited by a group of human rights defenders to deliver a public lecture on 3rd January 1999 in Sinnar, Blue Nile State. He alleges further that Mr. Ghazi Suleiman was prohibited from travelling to Sinnar by some security officials who threatened that if he made the trip, he would be arrested.
4. It is also alleged that this threat and the implied threat of repercussions for the group prevented him from embarking on the trip.

Additional information

5. The Complainant claims that the following actions were directed against Mr Ghazi Suleiman in the period between January 1998 and May 2002 to which this communication pertains:
 - a. Threats by security officials of the government of Sudan preventing travel to Sinnar on 3 January 1999,
 - b. An arrest on 7 April 1999
 - c. An arrest 8 June 1999
 - d. An attack on his office and his person on 17 November 1999
 - e. An arrest on 26 March 2000
 - f. An arrest on 9 December 2000
 - g. An arrest on 9 May 2002

Complaint

6. The Complainant alleges violations of Articles 9, 10, 11 and 12 of the of the Charter on Human and Peoples' Rights (the Charter) and that all these rights have been suspended under the national Security Act 1994, as amended in 1996.

Procedure:

7. At its 25th Ordinary Session held from 26th April to 5th May 1999 in Bujumbura, Burundi, the African Commission on Human and Peoples' Rights (the Commission) was seized of the communication.
8. On 18th August 1999, the Secretariat of the African Commission notified the parties of this decision.
9. The African Commission considered the communication at its 26th Ordinary Session held from 1st to 15th November in Kigali, Rwanda and requested the Complainant to submit written submissions on the issue of exhaustion of local remedies. In addition, the parties were requested to furnish the African Commission with the relevant legislation and court decisions (in either English or French).
10. On 21st January 2000, the Secretariat of the African Commission wrote to the parties informing them of the decision of the African Commission.
11. At the 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the parties made oral submissions and the African Commission decided to consolidate this communication with all the other communications brought against Sudan. It requested parties to address it further on the issue of exhaustion of domestic remedies.
12. The above decision was communicated to parties on 30th June 2000.
13. At the 28th Ordinary Session held from 23rd October to 6th November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th Ordinary Session and requested the Secretariat to incorporate the oral submissions made by the Respondent State and the Complainant into the draft decision to enable the African Commission take a reasoned decision on admissibility.
14. At the 29th Ordinary Session held in Tripoli, Libya, the African Commission noted that the Complainant had submitted a detailed brief on the case. It was therefore recommended that consideration of this communication be deferred to the 30th Session pending submission of a detailed response by the Respondent State.
15. On 19th June 2001, the Secretariat of the African Commission informed the parties of the above decision and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of the decision.
16. During the 30th Session held from 13th to 27th October in Banjul, The Gambia, the African Commission heard the oral submissions from both parties. Following detailed discussions on the matter, the African Commission noted that the Respondent State had not responded to the issues raised by the Complainant. The African Commission therefore deferred consideration of these communications to the 31st Session, pending receipt of detailed written submissions from the Respondent State to those of the Complainant.
17. On 15th November 2002, the Secretariat of the African Commission informed the parties on the decision of the African Commission and requested Respondent State to forward

its written submissions within two (2) months from the date of notification of its decision.

18. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission heard submissions from both parties and declared the communication admissible.
19. On 29th May 2002, the Respondent State and the Complainants were informed of the African Commission's decision.
20. At the 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the Representative of the Respondent State requested the African Commission orally and in writing to review its decision on admissibility relating to all the communications brought by the Complainant against the government of Sudan. The African Commission informed the Respondent State that the issue of admissibility of the communications had been settled and that the Respondent State should submit its arguments on the merits.
21. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

22. Article 56(5) of the Charter stipulates that communications relating to human rights...received by the African Commission shall be considered if they...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.
23. The Complainant alleges that no effective remedies existed at the time of the violation of human rights because the acts of security officers in Sudan were not subject to review by judicial authorities and furthermore, security officials were protected from prosecution by the National Security Act of 1994.
24. The Complainant alleges that the National Security Act of 1994, which was in effect at the time of Mr. Ghazi Suleiman's arrest, "by its terms, ensured that the security forces could and would operate completely outside the law". The result is that the threats of the security officials against Mr. Ghazi Suleiman, as well as their ability to carry them out, were acts conducted with impunity and against which Mr. Suleiman had no domestic remedy.
25. The Complainant states that in practice, procedures that may exist for the redress of human rights abuses by the government of Sudan are often inaccessible to individuals whose human rights have been violated because the regular judicial and the administrative remedies have substantial obstacles that prevent their use.
26. The Respondent State requested that this complaint be thrown out or withdrawn on the grounds that it is lacking in veracity, evidence or justification. It is submitted that the Complainant is trying to cause damage to the Sudanese judiciary on the basis of baseless allegations that bear no relationship to the substance of the complaint.

27. The Respondent State submits that Ghazi Suleiman is a human rights advocate in Sudan and as such there is no way he could have failed to bring a complaint with respect to the threat if it had really taken place. The Respondent State further submits that the Complainant should have exercised his constitutional rights by instituting court proceedings against the law enforcement agencies for failure to comply with and violating the Constitution and the law.
28. The Respondent State also submitted that the domestic remedies are effective and provided legislation and case precedents to support this claim.
29. 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 exhaustion of local remedies in terms of Article 56 (5) of the Charter.
30. In applying Article 56(5) of the Charter requires:“ the exhaustion of all domestic remedies, if they are of a judicial nature, are effective and are not subordinate to the discretionary power of the public authorities” (*See para. 37 of Communications 48/90,50/91 and 89/93 Amnesty International & al. / Sudan*).
31. Furthermore, the African Commission has held that:“ a remedy is considered available if the Complainant can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint” (*See para. 32. of Communications 147/95 and 149/96 Sir Dawda K. Jawara/ The Gambia*).
32. The Respondent State’s assertion of non-exhaustion of domestic remedies will therefore be looked at in this light. The existence of a remedy must be sufficiently certain, not only in theory but also in practice, failing which, it will lack the requisite accessibility and effectiveness. In the present case, the Complainant submits that Ghazi Suleiman could not resort to the judiciary of Sudan because of a general fear for his life.
33. In order to exhaust local remedies within the spirit of Article 56(5) of the Charter, one needs to have access to those remedies, but if Mr. Suleiman is constantly threatened, harassed and imprisoned, ofcourse he would have no access to local remedies, they would be considered to be unavailable to him.
34. The National Security Act of 1994 introduces an unfortunate aspect of the inexistence of remedies by stipulating that: “no legal action or appeal is provided for against any decision issued under this law”. This manifestly makes the procedure less protective of the victim.
35. The right to an appeal is a right falling under the right to have one cause heard as provided under Article 7 of the Charter. The right of appeal is also a determinant for the fulfilment of the requirement of exhaustion of local remedies under Article 56(5) of the Charter.
36. It should be noted that the actual application of the law was also made difficult due to the state of emergency obtaining in the country during this period. The Complainants had difficulty to obtain justice and exhaust existing local remedies due to the political situation of the country. In this case, “it is reasonable to assume that not only the procedure of

local remedies will be unduly prolonged, but also that it will yield no results". (See *Communication 129/94 Civil Liberties Organisation/Nigeria*)

37. For the above reasons, the African Commission declares the communication admissible.
38. The African Commission wishes to acknowledge the information brought to its attention by the Respondent State outlining the development that the Government of Sudan had undertaken in respect of the constitutional reforms to guarantee the civil liberties of its citizens and the judicial system of the country. The African Commission hopes that with these changes, the judicial system will be able to handle matters relating to human rights abuses expeditiously.

Merits

39. Article 9 of the Charter provides: "*Every individual shall have the right to receive information. Every individual shall have the right to express and disseminate his opinions within the law*"
40. The African Commission affirms the "fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms"¹.
41. The African Commission also holds that Article 9 "reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the conduct of public affairs in his country" (*Communications 105/93, 128/94, 130/94 and 152/96 Media Agenda and Constitutional Rights Project/Nigeria*)
42. The communication alleges that Mr. Ghazi Suleiman was arrested, detained, mistreated, and punished for his promotion and encouragement of human rights, which the Respondent State claims are inconsistent with its laws. These activities consisted of speaking out about violations of human rights, encouraging the government to respect human rights, encouraging democracy in his public speeches and interviews, and discussing democracy and human rights with others. These activities have not been conducted secretly, but have been carried out in public by Mr. Ghazi Suleiman for many years.
43. It is alleged that Mr. Ghazi Suleiman was exercising his right to freedom of expression to advocate for human rights and democracy in Sudan and was stopped; or, he was contemplating the exercise of his human rights for the same reasons but was prevented from exercising these rights.
44. During the 27th Ordinary Session of the African Commission, the Representative of the Respondent State did not contest the facts adduced by the Complainant, however, he states that the 1998 Constitution of Sudan guarantees the right to freedom of movement (Article 23), right to freedom of expression (Article 25) and the right to freedom of association (Article 26). He did not provide any defence to the allegations of arrests, detentions and intimidation of Mr. Ghazi Suleiman.

¹ Declaration of Principles on Freedom of Expression in Africa *adopted* by the African Commission on Human and Peoples' Rights 32nd Ordinary Session Oct.2002.

45. The Respondent State did not submit arguments on the merits in respect of this communication. In the view of the foregoing, the African Commission shall base its argument on the elements provided by the Complainant and condemn the State's failure not to submit arguments on the merits.
46. In adopting the Resolution on the Right to Freedom of Association, the African Commission noted that governments should be especially careful that "in regulating the use of this right, that the competent authorities should not enact provisions which would limit the exercise of this freedom...[and that]...the regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights." ² Mr. Ghazi Suleiman's speech is a unique and important part of political debate in his country.
47. Article 60 of the Charter provides that the African Commission shall draw inspiration from international law on human and people's rights.
48. The European Court on Human Rights recognises that "freedom of political debate is at the very core of the concept of a democratic society..." ³
49. The African Commission's view affirms those of Inter-American Court of Human Rights which held that: "freedom of expression is a cornerstone upon which the very existence of a society rests. It is indispensable for the formation of public opinion. It is also a *condition sine qua non* for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its options, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free." ⁴
50. The Inter American Court states that -: "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". ⁵ It is particularly grave when information that others are being denied concerns the human rights protected in the African Charter as did each instance in which Mr. Ghazi Suleiman was arrested.
51. The charges levied against Mr. Ghazi Suleiman by the government of Sudan indicate that the government believed that his speech threatened national security and public order.
52. Because Mr. Suleiman's speech was directed towards the promotion and protection of human rights, "it is of special value to society and deserving of special protection" ⁶
53. In keeping with its important role of promoting democracy in the Continent, the African Commission should also find that a speech that contributes to political debate must be

² See Resolution on the Freedom of Association, adopted at the 11th Ordinary Session in Tunis from 2 to 9 March 1992.

³ *Lingens v. Austria*, Judgment of the Eur. Ct.H.R. Series A. N. 236 (April 1992) and *Thorgeirson v. Iceland* Judgment of the Eur. Ct.H.R. Series A. N. 239 (June 1992).

⁴ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts 13 and 29 American Convention on Human Rights) Advisory Opinion OC-5/85, Serie A. N.5, November 1985 at para.70.

⁵ *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 of the American Convention on Human Rights)* Advisory Opinion OC-5/85, November 13, 1985, Inter-Am.CourtH.R. Ser.A. N.5 at para.30.

⁶ Article 6 of the U.N. Human Rights Defenders' Declaration

protected. The above challenges to Mr. Ghazi Suleiman's freedom of expression by the government of Sudan and violate his right to freedom of expression under Article 9 of the African Charter. However, the allegations of arrests, detentions and threats constitute also a violation of Article 6 of the Charter.

54. Articles 10 of the Charter provides: *"Every individual shall have the right to free association provided that he abides by the law"*
55. Article 11 of the Charter provides: *" Every individual shall have the right to assemble freely with others. The exercise of this right shall be subjected only to necessary restrictions provided for by the law, in particular those enacted in the interest of national security. . . and rights and freedoms of others. "*
56. By preventing Mr. Ghazi Suleiman from gathering with others to discuss human rights and by punishing him for doing so, the Respondent State had violated Mr. Ghazi Suleiman's human rights to freedom of association and assembly which are protected by Articles 10 and 11 of the African Charter.
57. The right to freedom of movement is guaranteed by Article 12 of the Charter that reads in relevant paragraph 1: *" Every individual shall have the right to freedom of movement and residence within the borders of the State provided he abides by the law"*
58. The communication alleges that some security officials who prohibited Mr. Ghazi Suleiman from travelling to Sinnar, threatened him that if he made the trip, he would be arrested.
59. The Complainant states that Ghazi Suleiman was arrested and released after being convicted, sentenced and incarcerated. Before his release, he was made to sign a statement restraining his future freedom, which he refused to sign.
60. The Respondent State argues that Mr. Ghazi Suleiman has never been prohibited from delivering lectures on human rights. He indicates that Mr. Ghazi Suleiman was free to travel and he in fact participated in a Human rights Conference held in Milan, Italy without any intervention from the authorities. The Respondent State adds that there is no control of movement of the people within the national territory, which is in line with Article 12 of the African Charter on Human and Peoples' Rights.
61. Mr. Ghazi Suleiman was acting to promote the protection of human rights in his country, Sudan. This is not only indicated by his longstanding record of human rights advocacy, but also by the events that transpired around the time of each arrest or act of harassment. These events always concerned actions or statements he made in support of human rights.
62. Such actions and expressions are among the most important exercises of human rights and as such should be given substantial protection that do not allow the State to suspend these rights for frivolous reasons and in a manner that is thus disproportionate to the interference with the exercise of these fundamental human rights.
63. The disproportionate actions of the government of Sudan against Mr. Ghazi Suleiman is evidenced by the fact that the government has not offered Mr. Ghazi Suleiman an alternative means of expressing his support for human rights in each instance. Instead the Respondent State has either prohibited Mr. Ghazi Suleiman from exercising his human

rights by issuing threats, or punished him after summary trial, without considering the value of his actions for the protection and promotion of human rights.

64. By stopping Mr. Ghazi Suleiman from travelling to Sinnar, which is located in the Blue Nile State, a part within the country under the control of the government of Sudan, to speak to a group of human rights defenders, the government of Sudan violated Mr. Ghazi Suleiman's right to freedom of movement in his own country. This constitutes a violation of Article 12 of the Charter
65. The fact that Mr. Ghazi Suleiman advocates peaceful means of action and his advocacy has never caused civil unrest is additional evidence that the complained about actions of the Respondent State were not proportionate and necessary to the achievement of any legitimate goal. Furthermore, the actions of the government of Sudan not only prevent Mr. Ghazi Suleiman from exercising his human rights, but these actions have a seriously discouraging effect on others who might also contribute to promoting and protecting human rights in Sudan.
66. For the above reasons, the interference with Mr. Ghazi Suleiman's rights of freedom of expression, association and assembly cannot be justified.

Therefore, the African Commission -:

Finds the Republic of Sudan in violation of Articles 6, 9, 10, 11 and 12 of the African Charter on Human and Peoples' Rights,

Requests the government of Sudan to amend its existing laws to provide for *de jure* protection of the human rights to freedom of expression, assembly, association and movement.

***Done at 33rd Ordinary Session in Niamey, Niger
from 15th to 29th May 2003.***

Rapporteur:

27th Session: Commissioner Chirwa
28th Session: Commissioner Chirwa
29th Session: Commissioner Chirwa
30th Session: Commissioner Chirwa
31st Session: Commissioner Chirwa
32nd Session:
33rd Session: Commissioner Chirwa

Summary of Facts:

1. The Complainant alleges that on 13th June 1999, the students of the Nubia Association at Ahlia University held a picnic in Buri, Khartoum along the banks of the river. Although under the law no permission is necessary for such a picnic, the students nevertheless sought permission and got it from the local authorities.
2. After starting off for some hours, security agents and policemen accosted the students, beating some of them and arresting others. They were alleged to have violated 'public order' contrary to Article 152 of the Criminal Law of 1991 because they were not properly dressed or acting in a manner considered being immoral.
3. The Complainant avers that the acts constituting these offences comprised of girls kissing, wearing trousers, dancing with men, crossing legs with men, sitting with boys and sitting and talking with boys.
4. The eight students arrested were Hanan Said Ahmed Osman, Sahar Ebrahim Khairy Ebrahim, Manal Mohammed Ahamed Osman, Omeima Hassan Osman, Rehab Hassan Abdelmajid, Huda Mohammed Bukhari, Noha Ali Khalifa and Nafissa Farah Awad.
5. On 14th June 1999, the eight students referred to in the above paragraph were convicted and sentenced to fines and or lashes. The said punishment was executed through the supervision of the court. This type of punishment is widespread in Sudan.
6. Complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were minor offences, which ordinarily would not have attracted such punishments. The alleged punishments therefore constitute cruel, inhuman and degrading punishment.
7. No written record of the proceedings is publicly available.
8. The Complainant submits on the issue of exhaustion of local remedies that since the sentences have already been executed, domestic remedies would no longer be effective.

Complaint

9. The Complainant alleges violation of Article 5 of the Charter.

Procedure

10. The complaint was received at the Secretariat of the African Commission on 17th March 2000.
11. At the 27th Ordinary Session held from 27th April to 11th May 2000 in Algiers, Algeria, the African Commission heard oral submissions from the parties, decided to be seized of the communication and consolidated it with all the other communications against the Republic of Sudan. The African Commission then requested the parties to address it on the issue of exhaustion of domestic remedies.
12. The above decision was communicated to parties on 30th June 2000.
13. At its 28th Ordinary Session held from 23rd October to 6th November 2000 in Cotonou, Benin, the African Commission decided to defer consideration of this communication to the 29th Ordinary Session and requested the Secretariat to incorporate the oral submissions of the Respondent State to enable the African Commission take a reasoned decision on admissibility.
14. At the 29th Ordinary Session held from 23rd April to 7th May 2001 in Tripoli, Libya, the representatives of the Respondent State present at the session informed the African Commission that they were not aware of the communications 235/00 and 236/00 - Curtis Doebbler/Sudan. During the Session, the Secretariat provided the representatives of the Respondent State with copies of the said communications. The African Commission decided to defer consideration of these communications to the next session.
15. On 19th 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 (2) months from the date of notification of this decision.
16. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the African Commission heard the oral submissions of the parties with respect to this matter. Following detailed discussions, 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 consideration of these communications to the 31st Session, pending receipt of detailed written submissions from the Respondent State in response to the submissions of the Complainant.
17. On 15th November 2002, the Secretariat of the African Commission informed the parties on the decision of the African Commission and requested the Respondent State to forward its written submissions within two (2) months from the date of notification of this decision.

18. At its 31st Ordinary Session held from 2nd to 16th May 2002, in Pretoria, South Africa, the African Commission heard submissions from both parties and declared the communication admissible.
19. On 29th May 2002, the Respondent State and the Complainants were informed of the African Commission's decision.
20. At the 32nd Ordinary Session, the Representative of the Respondent State made oral and written submissions requesting the African Commission to review its decision on admissibility relating to all the communications brought by the Complainant against the government of Sudan. The African Commission informed the Respondent State that the issue of admissibility of the communications had been settled and that the Respondent State should submit its arguments on the merits.
21. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

22. Article 56(5) of the Charter stipulates that "communications relating to Human and Peoples' Rights...received by the African Commission shall be considered if they...are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged..."
23. The Complainant alleges that no effective domestic remedies exist as the punishments were carried out immediately after the verdict and sentencing by the Court of First Instance. As a result, any right of appeal was thus illusory and ineffective for preventing the cruel, inhuman and degrading punishment to which the petitioners were subjected. The Complainant submits that a remedy that has no prospect of success does not constitute an effective remedy and states that the Criminal Code of Sudan had been steadfastly applied in numerous cases and hence there was no reasonable prospect of success of having it declared invalid.
24. He adds that a visa was denied to the legal representative of the victims. By failing to ensure that the victims were given a fair hearing in which their lawyers represented them in matters concerning their human rights under the Charter, the government of Sudan denied the victims the right to local effective remedies.
25. The Respondent State claims that the lawyers for the accused have not submitted any appeal against the judgment of the Court of Cassation, and after the expiry of the stipulated period for submitting an appeal to the Supreme Court the judgment became final. The defendants had the possibility of appealing against the judgment of the Court of Cassation to the Supreme Court since Article 182 of the 1991 criminal procedure entitles them to this right.
26. The Respondent State believes that the case does not deserve to be considered and submits that the accused students committed acts deemed criminal by the existing laws of the country; they legally appeared before the courts and enjoyed

their right to defence by a lawyer. They had an opportunity to appeal, which they did only once, and have not exhausted the opportunities which the law offered them. Article 56 (5) of the Charter provides for the requirement of exhausting all local remedies before appealing to the African Commission. He therefore requests the African Commission to declare the communication inadmissible.

27. In order to exhaust the local remedies within the spirit of Article 56(5) of the Charter, one needs to have access to those remedies but if victims have no legal representation it would be difficult to access domestic remedies.
28. For the above reasons, the African Commission declares the communication admissible.

Merits

29. Article 5 of the African Charter reads: “ *Every 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*”
30. Complainant alleges that eight of the students of the Ahlia University were arrested and convicted by a public order court for acts that violated the ‘public order’. He states that they were all sentenced to fines and between 25 and 40 lashes, the lashes were carried out in public on the bare backs of the women using a wire and plastic whip that leaves permanent scars on the women.
31. He points out that the instrument used to inflict the lashes was not clean and no doctor was present to supervise the execution of punishment and that the punishment therefore, could have resulted in severe infections to the victims.
32. Complainant alleges that the punishment of lashings are disproportionate and humiliating because they require a girl to submit to baring her back in public and to the infliction of physical harm which is contrary to the high degree of respect accorded to females in Sudanese society.
33. The Respondent State argues that the court found the accused guilty and decided to have them flogged with either a fine of fifty thousand Sudanese pounds each, or one-month imprisonment.
34. The Respondent State informed the African Commission that the lashings were justified because the authors of the petition committed acts found to be criminal according to the laws in force in the country.
35. There is little or no dispute between the Complainant and the Government of Sudan concerning the facts recounted above. The only dispute that arises is to whether or not the lashings for the acts committed in this instance violate the prohibition of article 5 as being cruel, inhumane, or degrading punishment.
36. Article 5 of the Charter prohibits not only cruel but also inhuman and degrading treatment. This includes not only actions which cause serious physical or

- psychological suffering, but which humiliate or force the individual against his will or conscience.
37. While ultimately whether an act constitutes inhuman degrading treatment or punishment depends on the circumstances of the case. The African Commission has stated that the prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses (*See Communication 225/98 Huri-Laws / Nigeria*)
 38. The European Court of Human Rights in *Tyler v. United Kingdom*,⁷ applying article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, entered into force 3 February 1953, that is substantially similar prohibition of cruel, inhuman, and degrading punishment as article 5 of the Charter, has similarly held that even lashings that were carried out in private, with appropriate medical supervision, under strictly hygienic conditions, and only after the exhaustion of appeal rights violated the rights of the victim. The Court stated that: “the very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, it is institutionalised violence that is in the present case violence permitted by law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long lasting physical effects, his punishment whereby he was treated as an object in the power of authorities—constituted an assault on precisely that which it is one of the main purposes of Article 3 to protect, namely a person dignity and physical integrity. Neither can it be excluded that the punishment may have had adverse psychological effects”.
 39. The Complainant alleges that the punishment meted out was grossly disproportionate, as the acts for which the students were punished were minor offences, which ordinarily would not have attracted such punishments.
 40. The Complainant submits that according to Islamic law the penalty of lashings may be meted out for some serious crimes. For example, *hadd* offenses may be punished with lashes under *Shari'a* because they are considered grave offences⁸ and strict requirements of proof apply. Minor offenses, however, cannot be punished as *hadd* because the *Qur'an* does not expressly prohibit them with a prescribed penalty. The acts committed by the students were minor acts of friendship between boys and girls at a party.
 41. The African Commission, however, wishes to assert that it was not invited to interpret Islamic *Shari'a* Law as obtains in the Criminal Code of the Respondent State. No argument was presented before it nor did the African Commission

⁷ (*Tyler v. United Kingdom*, European Court of Human Rights, 26 Eur.Ct.H.R. (ser. A) (1978), 2 E.H.R.R. 1 (1979-80) at para. 30 and *Ireland v. United Kingdom*, European Court of Human Rights, 25 Eur.Ct.H.R. (1978), 2 E.H.R.R. 25 (1979-80) at para. 162)

⁸ There are six crimes to which the *hadd* (“fixed”) penalties apply, namely, *zina* (fornication, *Qur'an* 24:2), *qadhif* (false accusation of fornication, *Qur'an* 24:4), *sukr* (drunkenness, prescribed in the *Qur'an* and *Sunnah*), *sariqa* (theft, *Qur'an* 5:38), *ridda* (apostasy), and *haraba* (rebellion, *Qur'an* 5:33). Also see Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law* (1990) at 108 and accompanying endnotes.

consider arguments based on the *Shari'a* Law. The African Commission hereby states that the inquiry before it was confined to the application of the African Charter in the legal system of a State Party to the Charter.

42. There is no right for individuals, and particularly the government of a country to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning State sponsored torture under the Charter and contrary to the very nature of this human rights treaty.
43. The facts in this communication have not been disputed by the Respondent State. In their oral submissions at the 33rd Ordinary Session, the Respondent State confirmed this by stating that it was the opinion of the Respondent State that it was better for the victims to have been lashed rather than hold them in detention for the said criminal offences and as such deny them of the opportunity to continue with their normal lives.
44. The law under which the victims in this communication were punished has been applied to other individuals. This continues despite the government being aware of its clear incompatibility with international human rights law.

For these reasons, the African Commission,

Finds the Republic of Sudan violation of Article 5 of the African Charter on Human and Peoples' Rights and,

Requests the Government of Sudan to -:

- **Immediately amend** the Criminal Law of 1991, in conformity with its obligations under the African Charter and other relevant international human rights instruments;
- **Abolish** the penalty of lashes; and
- **Take** appropriate measures to ensure compensation of the victims.

***Done at 33rd Ordinary Session in Niamey, Niger
from 15th to 29th May 2003***

Rapporteur:

29th Session: Commissioner Chigovera

30th Session: Commissioner Chigovera

31st Session: Commissioner Chigovera

32nd Session: Commissioner Chigovera

33rd Session: Commissioner Chigovera

Summary of Facts

1. The Complainants are mental health advocates, submitting the communication on behalf of patients detained at Campama, a Psychiatric Unit of the Royal Victoria Hospital, and existing and 'future' mental health patients detained under the Mental Health Acts of the Republic of The Gambia.
2. The complaint was sent by fax and received at the Secretariat on 7th March 2001.
3. The Complainants allege that legislation governing mental health in The Gambia is outdated.
4. It is alleged that within the Lunatics Detention Act (the principle instrument governing mental health) there is no definition of who a lunatic is, and that there are no provisions and requirements establishing safeguards during the diagnosis, certification and detention of the patient.
5. Further, the Complainants allege that there is overcrowding in the Psychiatric Unit, no requirement of consent to treatment or subsequent review of continued treatment.
6. The Complainants also state that there is no independent examination of administration, management and living conditions within the Unit itself.
7. The Complainants also complain that patients detained in the psychiatric unit are not even allowed to vote.
8. The Complainants notify the African Commission that there is no provision for legal aid and the Act does not make provision for a patient to seek compensation if his/her rights have been violated.

Complaint

9. The Complainants allege a violation of **Articles 2, 3, 5, 7(1)(a) and (c), 13(1), 16 and 18(4)** of the African Charter on Human and Peoples' Rights.

Procedure

10. Ms.H. Purohit and Mr. P. Moore presented the communication and it was received at the Secretariat on the 7th March 2001.

11. On 14th March 2001, the Secretariat wrote to the Complainants requesting that they furnish the names of the persons on whose behalf they were acting.
12. On the 4th April 2001, the Secretariat received the names of the persons on whose behalf Purohit and Moore were acting and it was stated clearly that those persons wished to remain **anonymous**.
13. At its 29th Ordinary Session from 23rd April to 7th May 2001 in Tripoli, Libya, the African Commission examined the Complaint and decided to be seized of it.
14. On 23rd May 2001, the Secretariat conveyed the above decision to the parties and requested parties to furnish it with additional information on admissibility in accordance with Article 56 of the African Charter and forwarded a copy of the text of the complaint to the Respondent State. The Parties were requested to present their written submissions to the Secretariat within three months of notification of the decision.
15. During the 30th Ordinary Session held from 13th to 27th October 2001 in Banjul, The Gambia, the African Commission considered the Complaint and the rapporteur of the communication addressed questions to the Representative of the Respondent State. The Representative stated that she was not in a position to provide satisfactory responses to the questions posed at the time but promised to do so soon after the 30th session. The African Commission decided to defer consideration of this communication to the 31st Ordinary Session pending receipt of the Respondent State's submissions.
16. On 9th November 2001, the Secretariat wrote to the Complainants informing them of the decision taken by the African Commission at its 31st Session and also forwarded them copies of the Respondent State's submissions that were received at the Secretariat on 11th October 2001. The Complainants were also reminded to forward exhaustive submissions on the question of admissibility of the complaint within two (2) months.
17. On 9th November 2001, the Secretariat also forwarded a Note Verbale to the Respondent State informing it of the decision of the African Commission and reminding them to furnish the African Commission with responses to the questions raised by the African Commission at its 31st Session within two (2) months.
18. The Secretariat also on numerous occasions by telephone and in writing reminded the Solicitor General of the Respondent State to ensure that their written submissions on this matter are forwarded to the Secretariat.
19. At the 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa the African Commission considered the communication and it was declared admissible.
20. On 29th May 2002, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility to the Secretariat within a period of 3 months.

21. At its 32nd Ordinary Session held from 17th to 23rd October in Banjul, The Gambia, the African Commission decided to defer consideration of the communication on the merits and the parties were informed accordingly.
22. By a Note Verbale dated 30th October 2002, the Respondent State was reminded to forward its written submissions on the merits to the Secretariat of the African Commission within a period of 2 months.
23. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

24. Article 56 of the African Charter governs admissibility of communications brought before the African Commission in accordance with Article 55 of the African Charter. All of the conditions of this Article are met by the present communication. Only Article 56(5), which requires that local remedies be exhausted, necessitates close scrutiny. Article 56(5) of the African Charter provides -:

Communications ... received by the African Commission shall be considered if they-:

- (5) *are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged*

25. The rule requiring exhaustion of local remedies as a condition of the presentation of a complaint before the African Commission is premised on the principle that the Respondent State must first have an opportunity to redress by its own means within the framework of its own domestic legal system, the wrong alleged to have been done to the individual.
26. The Complainants submit that they could not exhaust local remedies because there are no provisions in the national laws of The Gambia allowing for the Complainants to seek remedies where a violation has occurred.
27. The Respondent State concedes that the Lunatics Detention Act does not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. Neither do the patients have the legal right to challenge the two separate Medical Certificates, which constitute the legal basis of their detention.
28. The Respondent State submits that in practice patients found to be insane are informed that they have a right to ask for a review of their assessment. The Respondent State further states that there are legal provisions or procedures within the Gambia that such a vulnerable group of persons could have utilised for their protection. Section 7(d) of the Constitution of The Gambia recognises that Common Law forms part of the laws of The Gambia. As such, Respondent State argues, the Complainants could seek remedies by bringing an action in tort for false imprisonment or negligence where a patient held at Campama Psychiatric Unit is wrongly diagnosed.

29. The Respondent State further submits that patients detained under the Lunatics Detention Act have every right to challenge the Act in a Constitutional Court claiming that their detention under that Act deprives them of their right to freedom of movement and association as provided for under the Gambian Constitution.
30. The concern raised in the present communication is that in the Gambia, there are no review or appeal procedures against determination or certification of one's mental state for both involuntary and voluntary mental patients. Thus the legislation does not allow for the correction of an error assuming a wrong certification or wrong diagnosis has been made, which presents a problem in this particular case where examination of the said mental patients is done by general practitioners and not psychiatrists. So if an error is made and there is no avenue to appeal or review the medical practitioners' assessment, there is a great likelihood that a person could be wrongfully detained in a mental institution.
31. Furthermore, the Lunatics Detention Act does not lay out fixed periods of detention for those persons found to be of unsound mind, which, coupled with the absence of review or appeal procedures could lead into a situation where a mental patient is detained indefinitely.
32. The issue before the African Commission is whether or not there are domestic remedies available to the Complainants in this instance.
33. The Respondent State indicates that there are plans to amend the Lunatics Detention Act, which, in other words is an admission on part of the Respondent State that the Act is imperfect and would therefore not produce real substantive justice to the mental patients that would be detained.
34. The Respondent State further submits that even though the Act itself does not provide review or appeal procedures, there are legal procedures or provisions in terms of the constitution that the Complainants could have used and thus sought remedies in court. However, the Respondent State has informed the African Commission that no legal assistance or aid is availed to vulnerable groups to enable them access the legal procedures in the country. Only persons charged with Capital Offences get legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act.
35. In the present matter, the African Commission cannot help but look at the nature of people that would be detained as voluntary or involuntary patients under the Lunatics Detention Act and ask itself whether or not these patients can access the legal procedures available (as stated by the Respondent State) without legal aid.
36. The African Commission believes that in this particular case, the general provisions in law that would permit anybody injured by another person's action are available to the wealthy and those that can afford the services of private counsel. However, it cannot be said that domestic remedies are absent as a general statement – the avenues for redress are there if you can afford it.
37. But the real question before this Commission is whether looking at this particular category of persons the existent remedies are realistic. The category of people being represented in the present communication are likely to be people picked up from the

streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services.

38. If the African Commission were to literally interpret Article 56 (5) of the African Charter, it might be more inclined to hold the communication inadmissible. However, the view is that, even as admitted by the Respondent State, the remedies in this particular instance are not realistic for this category of people and therefore not effective and for these reasons the **African Commission declares the communication admissible.**

Merits

39. The present communication was declared admissible at the African Commission's 31st Ordinary Session in May 2002. The Respondent State has since been requested numerous times to forward their submissions on the merits but to no avail. On 29th April 2003, 2 weeks prior to the 33rd Ordinary Session, the Respondent State finally forwarded their written submissions to the Secretariat of the African Commission.
40. In coming to its decision, the African Commission will refer the more recent written submissions on the merits as presented by the Respondent State as well the Respondent State's submissions on admissibility in particular where they address issues relating to the merits of this communication.
41. When States ratify or accede to international instruments like the African Charter, they do so voluntarily and very much awake to their responsibilities to implement the provisions of these instruments. It therefore troubles the African Commission to be forced to make several requests to the Respondent State for its submissions, which are pertinent to its consideration of communications. In the present communication, it is very much unfortunate that the African Commission was forced to take this path bearing in mind the fact that its Headquarters is within the Respondent State. This situation not only seriously hampers the work of the African Commission but it also defeats the whole purpose of the African Charter, to which the Respondent States professes to be aligned with. The African Commission therefore hopes that in future the Respondent State will be forthcoming to its requests especially those relating to communications.
42. The Complainants submit that by ratifying the African Charter, the Respondent State undertook an obligation to bring its domestic laws and practice in conformity with the African Charter. This presupposes that any domestic law, which violates the African Charter, should as soon as the Respondent State ratifies or accedes to the African Charter be brought into conformity with Articles provided for therein. "As soon as" in this context would mean that States that are party to the African Charter should take immediate steps, mindful of their obligations, to bring their legislation in line with the African Charter. The legislation in dispute in the present communication – the LDA was enacted in 1917 and the last amendment to this Act was effected in 1964. There is no doubt that since 1964, there have been many developments in the field of human rights, particularly addressing the rights of persons with disabilities. As such, the LDA should have long been amended to bring it in line with the changed circumstances.

43. In principle, where domestic laws that are meant to protect the rights of persons within a given country are alleged to be wanting, the African Commission holds the view that it is within its mandate to examine the extent to which such domestic law complies with the provisions of the African Charter⁹. This is because when a State ratifies the African Charter it is obligated to uphold the fundamental human rights contained therein¹⁰. Otherwise if the reverse were true, the significance of ratifying a human rights treaty would be seriously defeated. This principle is in line with Article 14 of the Vienna Convention on the Law of Treaties of 1980.¹¹
44. The Complainants submit that the provisions of the Lunatics Detention Act (LDA) condemning any person described as a "lunatic" to automatic and indefinite institutionalisation are incompatible with and violate Articles 2 and 3 of the African Charter. Section 2 of the LDA defines a "lunatic" as including "an idiot or person of unsound mind".
45. The Complainants argue further that to the extent that mental illness is a disability¹², the practice of detaining persons regarded as mentally ill indefinitely and without due process constitutes discrimination on the analogous ground of disability.
46. Article 2 of the African Charter provides -:
- “ 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, or any other opinion, national or social origin, fortune, birth or other status.”*

Article 3 of the African Charter provides -:

1. *Every individual shall be equal before the law*
2. *Every individual shall be entitled to equal protection of the law*

47. In interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards.

⁹ Communication 211/98 – Legal Resources Foundation/Zambia

¹⁰ In the case of the Attorney General v Unity Dow 1994 6 BCLR 1 Per Ammisah JP at Pages 27-30 and Aguda JA at pages 43-47, The Botswana Appeal Court correctly observed that there is a presumption that when States sign or ratify treaties or human rights instruments, they signify their intention to be bound by and to adhere to the obligations arising from such treaties or human rights instruments even if they do not enact domestic legislation to effect domestic incorporation. Article 14 of the Vienna Convention provides as follows: “1. The consent of a State to be bound by a treaty is expressed by ratification when: (a) the treaty provides for such consent to be expressed by means of ratification; (b) it is otherwise established that the negotiating States were agreed that ratification should be required; (c) the representative of the State has signed the treaty subject to ratification; or (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation. 2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.”

¹² Paragraph 17 of the Introduction to the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities (UNGA Resolution 48/96 of 20th December 1993) provides that “the term “disability” summarises a great number of different functional limitations ...People may be disabled by physical, intellectual or sensory impairment, medical conditions or mental illness...”

48. The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that *“all human rights are universal, indivisible, interdependent, and interrelated.”*¹³
49. Articles 2 and 3 of the African Charter basically form the anti-discrimination and equal protection provisions of the African Charter. Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.
50. In their submissions to the African Commission, the Respondent State conceded that under the LDA, persons declared "lunatics" do not have the legal right to challenge the two separate Medical Certificates that constitute the legal basis of their detention. However, the Respondent State argued, that in practice patients found to be insane are informed that they have a right to ask for a review of their assessment. The Respondent State further argues that Section 7(d) of the Constitution of The Gambia recognises that Common Law forms part of the laws of The Gambia. Therefore, such a vulnerable group of persons are free to seek remedies by bringing a tort action for false imprisonment or negligence if they believe they have been wrongly diagnosed and as a result of such diagnosis been wrongly institutionalised.
51. Furthermore, the Respondent State submits that patients detained under the LDA have every right to challenge the Act in a Constitutional Court claiming that their detention under that Act deprives them of their right to freedom of movement and association as provided for under the Constitution of The Gambia.
52. In view of the Respondent State's submissions on the availability of legal redress, the African Commission questioned the Respondent State as to whether legal aid or assistance would be availed to such a vulnerable group of persons in order for them to access the legal procedures of in the country. The Respondent State informed the African Commission that only persons charged with Capital Offences are entitled to legal assistance in accordance with the Poor Persons Defence (Capital Charge) Act.
53. The category of persons that would be detained as voluntary or involuntary patients under the LDA are likely to be people picked up from the streets or people from poor backgrounds. In cases such as this, the African Commission believes that the general provisions in law that would permit anybody injured by another person's act can only be available to the wealthy and those that can afford the services of private counsel.
54. Clearly the situation presented above fails to meet the standards of anti-discrimination and equal protection of the law as laid down under the provisions of

¹³ Vienna Declaration and Programme of action, A/CONF.157/23, para.5

Articles 2 and 3 of the African Charter and Principle 1(4)¹⁴ of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Illnesses and the Improvement of Mental Health Care.¹⁵

55. The Complainants further submit that the legislative scheme of the LDA, its implementation and the conditions under which persons detained under the Act are held, constitute separately and together violations of respect for human dignity in Article 5 of the African Charter and the prohibition against subjecting anybody to cruel, inhuman or degrading treatment as contained in the same Charter provision.

56. Article 5 of the African Charter provides: -

‘Every individual shall have the right to the respect of 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.’

57. Human dignity is an inherent basic right to which all human beings, regardless of their mental capabilities or disabilities as the case may be, are entitled to without discrimination. It is therefore an inherent right which every human being is obliged to respect by all means possible and on the other hand it confers a duty on every human being to respect this right.

58. In **Media Rights Agenda/Nigeria**,¹⁶ the African Commission held that the term “cruel, inhuman or degrading punishment and treatment” is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental; furthermore, in **John K. Modise/Botswana**¹⁷, the African Commission stated that exposing victims to “personal suffering and indignity” violates the right to human dignity. Personal suffering and indignity can take many forms, and will depend on the particular circumstances of each communication brought before the African Commission.

59. Under the LDA, persons with mental illness have been branded as “lunatics” and “idiots”, terms, which without any doubt dehumanise and deny them any form of dignity in contravention of Article 5 of the African Charter

60. In coming to this conclusion, the African Commission would like to draw inspiration from Principle 1(2) of the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care. Principle 1(2) requires that “all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person.”

61. The African Commission maintains that mentally disabled persons would like to share the same hopes, dreams and goals and have the same rights to pursue those hopes, dreams and goals just like any other human being¹⁸. Like any other human

¹⁴ Principle 1(4) provides - *There shall be no discrimination on the grounds of mental illness. “Discrimination” means any distinction, exclusion or preference that has an effect of nullifying or impairing equal enjoyment of rights.*

¹⁵ G.A. Res. 46/119, 46 U.N. GAORSupp. (No. 49) at 189, U.N. Doc A/46/49 (1991)

¹⁶ Communication 224/98

¹⁷ Communication 97/93 (decision reached at the 27th ordinary session of the African Commission held in 2000)

¹⁸ Article 3 of the UN Declaration on the Rights of Disabled Persons, UNGA

being, mentally disabled persons or persons suffering from mental illnesses have a right to enjoy a decent life, as normal and full as possible, a right which lies at the heart of the right to human dignity. This right should be zealously guarded and forcefully protected by all States party to the African Charter in accordance with the well established principle that all human beings are born free and equal in dignity and rights.¹⁹

62. The Complainants also submit that the automatic detention of persons considered “lunatics” within the meaning of the LDA violates the right to personal liberty and the prohibition of arbitrary arrest and detention in terms of Article 6 of the African Charter.

63. Article 6 of the African Charter provides -:

‘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.’

64. Article 6 of the African Charter guarantees every individual, be they disabled or not, the right to liberty and security of the person. Deprivation of such liberty is only acceptable if it is authorised by law and is compatible with the obligations of States Parties under the African Charter²⁰. However, the mere mention of the phrase ‘except for reasons and conditions previously laid down by law’ in Article 6 of the African Charter does not mean that any domestic law may justify the deprivation of such persons’ freedom and neither can a State party to the African Charter avoid its responsibilities by recourse to the limitations and claw back clauses in the African Charter²¹. Therefore, any domestic law that purports to violate this right should conform to internationally laid down norms and standards.

65. Article 6 of the African Charter further states that no one may be arbitrarily arrested or detained. Prohibition against arbitrariness requires among other things that deprivation of liberty shall be under the authority and supervision of persons procedurally and substantively competent to certify it.

66. Section 3(1) of the LDA prescribes circumstances under which mentally disabled persons can be received into a place of detention and they are -:

- On submission of 2 certificates by persons referred to under the LDA as “duly qualified medical practitioners”
- Upon an order being made by and signed by judge of the Supreme Court, a Magistrate or any two Justices of the Peace

67. A “duly qualified medical practitioner” under the LDA has been defined as “every person possessed of a qualification entitling him to be registered and practice medicine in The Gambia”²².

Resolution 3447(XXX) of 9th December 1975, provides that “Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and as full as possible.”

¹⁹ Article 1 of the Universal Declaration of Human Rights of 1948

²⁰ Consolidated communications 147/95, 149/95 – Sir Dawda K. Jawara/The Gambia

²¹ Communication 211/98 Legal Resources Foundation/Zambia

²² Section 2 of the Lunatics Detention Act Cap 40:05, Laws of The Gambia

68. By these provisions, the LDA authorises the detention of persons believed to be mentally ill or disabled on the basis of opinions of general medical practitioners. Although the LDA does not lay out fixed periods of detention for persons found to be mentally disabled, the Respondent State has submitted that in practice the length of time spent by patients in the unit ranges from two to four weeks and that it is only in exceptional circumstances that patients may be detained longer than this period. These exceptional circumstances apply to mainly schizophrenics, and vagrant psychotics without any family support and known addresses. The African Commission takes note of the fact that such general medical practitioners may not be actual experts in the field of mental health care and as such there is a possibility that they could make a wrong diagnosis upon which certain persons may be institutionalised. Additionally, because the LDA does not provide for review or appeal procedures, persons institutionalised under such circumstances would not be able to challenge their institutionalisation in the event of an error or wrong diagnosis being made. Although this situation falls short of international standards and norms²³, the African Commission is of the view that it does not violate the provisions of Article 6 of the African Charter because Article 6 of the African Charter was not intended to cater for situations where persons in need of medical assistance or help are institutionalised.
69. The Complainants also allege that institutionalisation of detainees under the LDA who are not afforded any opportunity of being heard or represented prior to or after their detention violates Article 7 (1) (a) and (c) of the African Charter.
70. Article 7 (1) (a) and (c) of the African Charter provides -:
1. *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;*
 - c) *The right to defence, including the right to be defended by counsel of his choice.*
71. It is evident that the LDA does not contain any provisions for the review or appeal against an order of detention or any remedy for detention made in error or wrong diagnosis or treatment. Neither do the patients have the legal right to challenge the two separate Medical Certificates, which constitute the legal basis of their detention. These omissions in the LDA clearly violate Articles 7(1)(a) and (c) of the African Charter.
72. The guarantees in Article 7 (1) extend beyond hearings in the normal context of judicial determinations or proceedings. Thus Article 7(1) necessitates that in circumstances where persons are to be detained, such persons should at the very least be presented with the opportunity to challenge the matter of their detention before the competent jurisdictions that should have ruled on their detention.²⁴ The entitlement of persons with mental illness or persons being treated as such to be heard and to be represented by Counsel in determinations affecting their lives, livelihood, liberty, property or status, is particularly recognised in Principles 16, 17

²³ See Principles 15, 16 and 17 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care

²⁴ Communication 71/92, *Rencontre Africaine pour la defense des droits de l'homme/Zambia*, (1995); Communication 159/96, *UIDH et al/ Angola*, (1997)

and 18 of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care.

73. The Complainants submit that the failure of the Respondent State to provide for and enable the detainees under the LDA to exercise their civic rights and obligations, including the right to vote, violates Article 13 (1) of the African Charter which provides:-

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

74. In its earlier submissions, the Respondent State admits that persons detained at Campama are not allowed to vote because they believe that allowing mental health patients to vote would open the country’s democratic elections to much controversy as to the mental ability of these patients to make an informed choice as to which candidate to vote for. Subsequently, the Respondent State in its more recent submissions suggests that there are limited rights for some mentally disabled persons to vote; however this has not been clearly explained.

75. The right provided for under Article 13(1) of the African Charter is extended to “every citizen” and its denial can only be justified by reason of legal incapacity or that the individual is not a citizen of a particular State. Legal incapacity may not necessarily mean mental incapacity. For example a State may fix an age limit for the legibility of its own citizens to participate in its government. Legal incapacity, as a justification for denying the right under Article 13(1) can only come into play by invoking provisions of the law that conform to internationally acceptable norms and standards.

76. The provisions of Article 13(1) of the African Charter are similar in substance to those provided for under Article 25 of the International Covenant on Civil and Political Rights. In interpreting Article 13(1) of the African Charter, the African Commission would like to endorse the clarification provided by the Human Rights Committee in relation to Article 25. The Human Rights Committee has expressed that any conditions applicable to the exercise of Article 25 rights should be based on objective and reasonable criteria established by law.²⁵ Besides the view held by the Respondent State questioning the mental ability of mentally disabled patients to make informed choices in relation to their civic duties and obligations, it is very clear that there are no objective bases within the legal system of the Respondent State to exclude mentally disabled persons from political participation.

77. The Complainants submit that the scheme and operation of the LDA both violate the right to health provided for in Article 16 of the African Charter when read with Article 18 (4) of the African Charter.

78. Article 16 of the African Charter provides -:

1. *Every individual shall have the right to enjoy the best attainable state of physical and mental health*
2. *State 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.*

²⁵ Human Rights Committee, General Comment 25 (57), Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), paragraph 4.

79. Article 18(4) of the African Charter which provides -:
“The aged and disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.”
80. Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind.
81. More so, as a result of their condition and by virtue of their disabilities, mental health patients should be accorded special treatment which would enable them not only attain but also sustain their optimum level of independence and performance in keeping with Article 18(4) of the African Charter and the standards applicable to the treatment of mentally ill persons as defined in the Principles for the Protection of Persons with Mental Illness and Improvement of Mental Health Care.
82. Under the Principles, “mental health care” includes analysis and diagnosis of person's mental condition and treatment, care and rehabilitation for a mental illness or suspected mental illness. The Principles envisage not just ‘attainable standards’, but the highest attainable standards of health care for the mentally ill at three levels. First, in the analysis and diagnosis of a person's mental condition; second, in the treatment of that mental condition and; thirdly, during the rehabilitation of a suspected or diagnosed person with mental health problems.
83. In the instant case, it is clear that the scheme of the LDA is lacking in terms of therapeutic objectives as well as provision of matching resources and programmes of treatment of persons with mental disabilities, a situation that the Respondent State does not deny but which never-the-less falls short of satisfying the requirements laid down in Articles 16 and 18(4) of the African Charter.
84. The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on part of States party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.
85. The African Commission commends the Respondent State's disclosure that there is no significant shortage of drug supplies at Campama and that in the event that there are drug shortages, all efforts are made to alleviate the problem. Furthermore, that it has taken steps to improve the nature of care given to mental health patients held at Campama. The Respondent State also informed the African Commission that it is fully aware of the outdated aspects of the LDA and has therefore long taken administrative steps to complement and/or reform the archaic parts of the LDA. This is however not enough because the rights and freedoms of human beings are at stake. Persons with mental illnesses should never be denied their right to proper

health care, which is crucial for their survival and their assimilation into and acceptance by the wider society.

For the above reasons, the African Commission,

Finds the Republic of The Gambia in violation of Articles 2, 3, 5, 7 (1)(a) and (c), 13(1), 16 and 18(4) of the African Charter.

Strongly urges the Government of The Gambia to -:

- (a) Repeal the Lunatics Detention Act and replace it with a new legislative regime for mental health in The Gambia compatible with the African Charter on Human and Peoples' Rights and International Standards and Norms for the protection of mentally ill or disabled persons as soon as possible;
- (b) Pending (a), create an expert body to review the cases of all persons detained under the Lunatics Detention Act and make appropriate recommendations for their treatment or release;
- (c) Provide adequate medical and material care for persons suffering from mental health problems in the territory of The Gambia;

Requests the Government of The Gambia to report back to the African Commission when it submits its next periodic report in terms of Article 62 of the African Charter on measures taken to comply with the recommendations and directions of the African Commission in this decision.

***Done at the 33rd Ordinary Session of the African Commission
held from 15th to 29th May 2003 in Niamey, Niger***

*COMMUNICATION
POSTPONED SINE DIE*

233/99 - Interights (on behalf of Pan African Movement and Citizens for Peace in Eritrea) / Ethiopia

And

234/99 - Interights (on behalf of Pan African Movement and Inter Africa Group) / Eritrea

Rapporteur:

26th Session: Commissioners Badawi and Johm
27th Session: Commissioners Badawi and Johm
26th Session: Commissioners Badawi and Johm
27th Session: Commissioners Badawi and Johm
28th Session: Commissioners Badawi and Johm
29th Session: Commissioners Badawi and Johm
30th Session: Commissioners Badawi and Johm
31st Session: Commissioner Johm
32nd Session: Commissioner Johm
33rd Session: Commissioner Johm

Summary of Facts

1. The Complainant alleges that sometime in the second quarter of 1998 there was an international armed conflict between Eritrea and Ethiopia that led to the beginning of active hostilities between the two countries.
2. During this period it is alleged by the Complainant that thousands of persons of Ethiopian nationality were expelled from Eritrea, either directly or constructively by the creation of conditions in which they had no choice other than to leave Eritrea. In particular, over 2,500 were forcibly expelled and dumped at the border where there was ferocious fighting and heavily infested with anti-personnel land mines.
3. It is also alleged that between June 1998 and July 1999, more than sixty one thousand people of Eritrean ethnic descent who are legal residents or citizens of Ethiopia were deported from Ethiopia. Most of these are urban deportees.
4. The Complainant asserts that in both cases, thousands of persons of Ethiopian origin and those of Eritrean origin were arrested and interned in Eritrea and Ethiopia respectively under harsh conditions with no visitation rights for their families, no food, clothing and toilet facilities for extended periods of time.
5. The Complainant alleges that some Ethiopian women and young girls were tortured and raped in the affected areas by Eritrean soldiers.
6. The Complainant also alleges that most of the deportees were subjected to cruel, inhuman and degrading treatment. Furthermore, the governments of Eritrea and Ethiopia arbitrarily deprived most of the deportees their property.

7. Specifically in the case of those persons deported by the government of Eritrea, some deportees were forced to work without salaries in exchange for protection. Yet others were forced out of their rental accommodation, suffering forcible eviction and homelessness as a result.
8. While in the case of those persons deported by the government of Ethiopia, the deportees, prior to their deportation were required to transfer their rights over their property in Ethiopia by a power of attorney to a legal agent. In compliance with this, husbands often designated their wives as their legal agents, only to find that their wives were given a month or two to sell their properties and were then deported a week or two after they were told to sell. In effect, the deportation was accompanied in most cases by an expropriation of the property of the deportees. In some cases some deportees also had their rental properties taken over. Some bank accounts were frozen, and some savings books were destroyed, making it impossible for the deportees or their designated agents to gain access to such savings.
9. The Complainant claims that while effecting the said deportations, parents and children were forcibly separated without any provision for the care, feeding, and housing of the children. As at the time of submission of the complaints, neither parents nor children can travel across the Eritrean-Ethiopian border and even telephone communication is impractical.

Complaint:

10. The Complainant alleges violations of Articles 1, 2, 3, 4, 5, 6, 7 (1), 12 (1), (2), (4) and (5), 14, 15, 16 and 18(1) of the African Charter.

Procedure

11. The complaint lodged by Interights against Eritrea and Ethiopia was received at the Secretariat of the African Commission on 5th October 1999.
12. At its 26th ordinary session held in Kigali, Rwanda, the African Commission decided to be seized of communications 233/99 and 234/99 and requested the Parties to furnish it with additional information on its admissibility in accordance with Article 56 of the Charter.
13. On 17th January 2000, the Secretariat conveyed the above decision to the parties and forwarded a copy of the summary of the communication and the original text of the complaint together with the documents attached thereto.
14. On 30th April 2000, during the 27th ordinary session of the African Commission, the Allard K. Lowenstein International Human Rights Law Clinic at the Yale Law School in the United States submitted an *amicus curiae* brief to the African Commission on the complaint brought against Ethiopia.
15. At its 27th ordinary session held in Algeria, the African Commission heard the representatives of the parties on the admissibility of the case. It declared both communications admissible and requested parties to submit their arguments on the merits. The various parties were informed accordingly of the decision of the African Commission.

16. At its 28th ordinary session held in Cotonou, Benin, the African Commission heard both parties.
17. At its 29th ordinary session held in Libya, the African Commission heard both parties and decided to consolidate **Communications 233/99 and 234/99**. The African Commission deferred consideration both communications on the merits to the 30th Ordinary Session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of Rule 104 of the Rules of Procedure of the African Commission -:
 - a. On the desirability or otherwise of considering the communications under the provisions of Articles 47-54 of the African Charter on Human and People's Rights on communications between States and to follow the procedure laid down there-under;
 - b. On the extent to which matters covered by the complaint are the subject of the Peace Agreement between the Government of Democratic Federal Republic of Ethiopia and the Government of State of Eritrea signed in Algiers on 12th December 2000, including the mechanism for the consideration of claims by individuals in either State whose citizenship may be in dispute [Article 5(8)];

And in the alternative -:

- c. Indicate the relevance or otherwise of Article 56(7); and
 - d. Whether a final decision on the merits at this stage will have an impact and what effect, if any, that would have on the peace process between the two countries.
18. On 18th June 2001 both parties were informed of the African Commission's decision and were invited to forward their submissions on the abovementioned questions.
19. At its 30th ordinary session held in The Gambia, the African Commission heard oral submissions from all the parties and decided as follows -:
 - The Governments of the Federal Democratic Republic of Ethiopia and the State of Eritrea should submit claims relating to the abovementioned communication to the Claims Commission.
 - That any correspondence relating to communication 233/99 and 234/99 made to the Claims Commission should be copied and forwarded to the African Commission.
 - To postpone further consideration on the merits of communication 233/99 and 234/99 to the 31st Ordinary Session to ascertain whether matters covered by the communication are also covered by and have been submitted to the Claims Commission.
20. On 24th October 2001 the parties were informed of the decision of the African Commission.

21. During the 31st ordinary session of the African Commission, Eritrea submitted a letter from the President of the Claims Commission. In that letter the President of the Claims Commission states to the effect that, Eritrea and Ethiopia can provide the African Commission with copies of their statements of claim or other appropriate information relating to the Claims Commission if required by the African Commission.
22. At its 31st ordinary session, the African Commission heard oral submissions from all the parties to the communication and decided to defer consideration of the matter to the 32nd session in order to allow the Complainants time to forward their written responses to the written submissions of Ethiopia.
23. On 7th June 2002, all the parties to the abovementioned communication were informed of the African Commission's decision. Interights was requested to forward its written response to the Secretariat of the African Commission within 2 months from the date of notification.
24. On 30th July 2002, Interights was reminded that the Secretariat was awaiting to receive their written submissions on or before the 7th August 2002. There has been no response from Interights thus far.
25. At its 32nd ordinary session, the African Commission heard oral submissions from the State of Eritrea and decided to defer consideration of this communication to the 33rd ordinary session. Parties to the communication were informed accordingly.
26. At its 33rd Ordinary Session, held from 15th to 29th May 2003, in Niamey Niger, the African Commission decided to suspend consideration of these communications *sine die*.

LAW

Admissibility

27. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.
28. Of the seven conditions, the government of Ethiopia claims that the Complainants have not fulfilled three; namely: **Article 56(1), (5) and (7)**. Additionally, it questions the neutrality, credibility and integrity of the NGOs submitting the communication.
29. The State of Eritrea on its part claims that the Complainants have not fulfilled two conditions, namely: **Article 56(6) and (7)**.
30. Article 56(1) of the African Charter stipulates
"Communications relating to human and peoples rights referred to in Article 55
..... shall be considered if they:
(1) *Indicate their authors even if the latter request anonymity*"
31. The government of Ethiopia submits that the Complainants being NGOs are expected to provide the names of their representatives, and since they failed to do so

- in their letter of August 1999 the African Commission should reject the communication.
32. Furthermore, the government of Ethiopia questions the neutrality, credibility and integrity of the NGOs submitting the communications. This, the government alleges is evidenced by the superficial treatment given by the Complainant NGOs to the plight of thousands of Ethiopians suffering in the hands of the Eritrean government whereas with respect to Eritrea, they submitted a detailed verbatim report. Ethiopia thus claims that the submission on Ethiopia is only an attempt by the Complainant to give it a semblance of credibility.
33. The African Commission is of the view that in terms of Article 56(1) of the African Charter, it is enough if the said complaint bears, as in this case, the name of one of the Organisation's representatives. Thus the present complaint cannot be declared inadmissible on the basis of Article 56(1).
34. With respect to the question of the neutrality, credibility and integrity of the NGOs submitting the communication, the African Commission does not consider this issue as one that falls within the requirement for the admissibility of the communication as stipulated under Article 56 of the Charter. In any case, the evidence before the African Commission does not lead it to uphold the submission of the government of Ethiopia on the credibility, neutrality and integrity of the NGOs particularly Interights which effectively became the Complainant.
35. Article 56(5) of the African Charter stipulates -:
"Communications relating to human and peoples rights referred to in Article 55 shall be considered if they:
(5) Are sent after exhausting local remedies, if any unless it is obvious that this procedure is unduly prolonged"
36. Regarding the issue of exhaustion of local remedies, the government of Ethiopia submits that the Complainants have not availed themselves of the remedies available at the local courts before approaching the African Commission.
37. The Complainant asserts, and the African Commission is of the opinion that there were no domestic remedies available to the Complainants, as a practical matter in this case. In coming to this decision the African Commission relies on its decision on the issue in **Communication 71/92 Recontre Africaine Pour la Defense des Droits de l'Homme/Zambia** a case that involved mass deportation and transfer of multiple victims. In this case the African Commission observed that
" The mass nature of the arrests, the fact that victims were kept in detention prior to their expulsion, and the speed with which the expulsions were carried out gave the Complainants no opportunity to establish the legality of these actions in the courts. For Complainants to contact their families, much less attorneys was not possible. Thus the recourse referred to by the government, ... was, as a practical matter, not available to the Complainants. "
38. The government of Eritrea alleges that the Complainant has not fulfilled the conditions stipulated under Article 56(6) of the African Charter. Article 56(6) of the African Charter reads
"Communications relating to human and peoples rights referred to in Article 55 shall be considered if they:

(6) are submitted within a reasonable period from the time local remedies are exhausted or from the time local remedies are exhausted or from the date the commission is seized with the matter"

39. The African Commission is of the view that bearing in mind its decision in relation to Article 56(5), compliance with the provisions of Article 56(6) of the African Charter by the Complainant is rendered inapplicable.
40. Both the governments of Eritrea and Ethiopia also raise an objection to the African Commission admitting the communications stating that the Complainants did not comply with the provisions of Article 56(7) of the African Charter.
41. At its 27th ordinary session held in Algeria, after hearing the representatives of the parties on the admissibility of the case, the African Commission decided to declare both communications admissible.
42. It is to be recalled that at its 29th ordinary session held in Libya, the African Commission heard oral submissions from all the parties and decided to consolidate **Communications 233/99 and 234/99**. The African Commission also postponed further consideration on the merits of the case to the 30th Ordinary Session and invited parties to the communication 233/99 and 234/99 to submit arguments for the purpose of clarifications in terms of Rule 104 of the Rules of Procedure of the African Commission.

Clarifications Sought By The African Commission In Terms Of Rule 104 Of The Rules Of Procedure Of The African Commission

The desirability or otherwise of considering the communications under Articles 47-54 of the African Charter

43. The Respondent States argue that it is undesirable that the communications before the African Commission be converted into State-to-State proceedings. The government of Ethiopia takes this position because the two countries, Ethiopia and Eritrea have already negotiated and signed a Peace Agreement with regard to the conflict that gave rise to the human rights violations that were committed by the respective States. Therefore the African Commission should discontinue considering the complaints before it and let the Ethio-Eritrean Claims Commission handle the matters raised within the complaints.
44. The communications presently before the African Commission are governed by Articles 55-57 of the Charter, a category of cases clearly distinct from complaints governed by Articles 47-54 of the Charter. The provisions of the African Charter and the rules of procedure do not provide for any procedure to convert non-State communications into inter-state communications. The initiation of an inter-state complaint is dependent on the voluntary exercise of the sovereign will of a State party to the Charter, which decision can only be made by States in accordance with the Charter. From the submissions of the Respondent States, the African Commission comes to the conclusion that Ethiopia and Eritrea do not wish to initiate an inter-state complaint before the African Commission; furthermore they believe that the complaint against them that is before the African Commission should be dismissed as they believe that the Ethio-Eritrean Claims Commission would be better suited to handle the matters raised in those complaints. The African

Commission cannot and will therefore not consider the communication under Articles 47-54, a procedure relating to the consideration of inter-state communications.

The Extent To Which Matters Covered By The Complaints Are The Subject Of The Peace Agreement Between The Governments Ethiopia And Eritrea Signed On 12th December 2000, Including The Mechanism For The Consideration Of Claims By Individuals In Either State Whose Citizenship May Be In Dispute (Article 5(8))

45. The matters raised by the Complainants before the African Commission relate to abuse of human rights of people in violation of the provisions of the African Charter by the governments of Ethiopia and Eritrea during the period of the Ethio-Eritrean Conflict.

46. Article 5(1) of the Peace Agreement between the Respondent States establishes a Claims Commission and further spells out its mandate. Article 5(1) of the Peace Agreement provides -:

- (1) Consistent with the Framework Agreement, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration, all claims for loss, damage or injury by one Government against the other, and by nationals (including both neutral and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are:*
- (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation or, Cessation of Hostilities Agreement, and*
 - (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law.*

47. The mechanism for the considering claims brought by Ethiopia and Eritrea is governed by Article 5(8) of the Peace Agreement which provides -:

- (8) Claims shall be submitted to the Commission by each of the parties on its own behalf and on behalf of its nationals, including both natural and juridical persons. All claims submitted to the Commission shall be filed no later than one year from the effective date of this agreement. Except for claims submitted to another mutually agreed settlement mechanism in accordance with paragraph 16 or filed in another forum prior to the effective date of this agreement, the Commission shall be the sole forum for adjudicating claims described in paragraph 1 or filed under paragraph 9 of this Article, and any such claims which could have been and were not submitted by that deadline shall be extinguished, in accordance with international law.*

48. As part of their submissions on the clarification sought by the African Commission, the government of Ethiopia forwarded documents relating to the Claims Commission's hearings that were held from 1st to 2nd July 2001. During the hearings, the Claims Commission addressed itself to the nature of the claims that the governments of Ethiopia and Eritrea will place before it. The Claims Commission was of the view that its jurisdiction under Article 5(1) includes two basic types of claims. The Parties may file traditional Inter-State claims under the principles of the law of State Responsibility for injury to the Claimant State. These may include claims for injuries to the State occurring by reason of injuries to its nationals in violation of international law. Or, the Parties may choose to file the claims of individual nationals

that fall within the scope of Article 5(1). The Claims Commission is open to either approach, or to a combination of them, so long as no duplicate compensation for the same injury results.

49. At the 31st session of the African Commission, both the Respondent States asserted that they had filed with the Claims Commission, all the matters covered by communication 233/99 and 234/99.

50. The government of Eritrea contended that it made claims for violations of the rights of Eritrean citizens and/or Ethiopian citizens of Eritrean ethnic origin and that these claims also constitute allegations of violations of the African Charter and of international law (Statements of Claims Nos. 15, 16, 17, 19 and 21). The claims include the internment without trial of civilians because of their membership in political organisations or for reasons of their ethnicity or national origin. The government of Eritrea stated that it made claims on behalf of persons of Eritrean citizenship and/or Eritrean national origin for -:

- The illegal internment of civilians in concentration camps without formal accusation or trial;
- The physical maltreatment and torture of such individuals;
- The discriminatory dismissals from employment, evictions from rental property, and seizure of property from persons of Eritrean national origin who are still present in Ethiopia.

51. The government of Ethiopia also argues that the allegations presented in this communication have been submitted to the Claims Commission. They state that in their Statement of Claim No. 5 that they submitted before the Claims Commission, they made claims for the unlawful treatment of Ethiopian nationals living in Eritrea, including arbitrary detention, mass internment, torture, abuse, murder, forced disappearances, forced conscription into the military, confiscation of property and systematic rape of Ethiopian women. The Statement of Claim also includes factual representations relating to the Eritrean government's policy of discrimination against Ethiopians in Eritrea, including arbitrary dismissal of Ethiopian nationals from public and private employment in Eritrea; Eritrea's unlawful restrictions on the freedom of movement, including exit from Eritrea and forceful expulsion of Ethiopians and unlawful and inhuman conditions during the expulsion of Ethiopian nationals from Eritrea.

The Relevance Or Otherwise Of Article 56(7) Of The African Charter

52. Article 56(7) of the African Charter provides:

"Communication relating to human and peoples' rights referred to in Article 55 received by the Commission, shall be considered if they:

(7) do not deal with cases which have been settled by these 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

53. Article 56(7) of the Charter precludes the African Commission from considering cases that have been settled by States 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.

54. The Complainant refers the African Commission to its decision in **Communication 59/91, Emgba Mekongo Louis/Cameroon**, where it held that mediation by political institutions such as the European Union was irrelevant to Article 56(7) of the Charter. Interights thus submits that this holding applies with equal force to the political organs of the OAU.
55. The Claims Commission created by a Peace Agreement should not be viewed as a political organ of the OAU; rather it is a body that has been established under a Peace Agreement and which, under Article 5(13), is bound to apply rules of international law and cannot make decisions *ex aequo et bono*. Indeed the Claims Commission has ruled that in dealing with evidence, they must apply evidentiary rules that prove or disprove disputed facts (See decision number 4 of the Claims Commission). The Claims Commission therefore has the capacity, unlike the African Commission to deal with complex matters such as the citizenship status of the individuals, what amount of compensation shall be awarded and to whom, in respect of the violations that they have suffered. Such was the complexity that the African Commission was faced with in **Emgba Mekongo Louis/Cameroon** (*supra*) where it found a violation of Mekongo's rights but stated "that it was unable to determine their amount and the quantum should be determined under the law of Cameroon".
56. In **Communication 60/91, Constitutional Rights Project/Nigeria**, the African Commission held that it would not rely on the process or mechanism of a "discretionary, extra-ordinary ... non-judicial nature" or that "have no obligation to decide according to legal principles" to preclude the admissibility of a communication under Article 56(7) of the African Charter. The African Commission would say that this is clearly not the case with regard to the Claims Commission as has been demonstrated by Article 5(13) of the Peace Agreement that provides that it is bound to apply rules of international law and cannot make decisions *ex aequo et bono*. This therefore puts the Claims Commission under those bodies envisaged under Article 56(7).
57. From the submissions of the Respondent States, it seems to the African Commission, that the matters brought before it, are matters that have been placed before the Claims Commission which can therefore adequately deal with such matters.
58. At the 31st Ordinary Session, the Complainants requested the African Commission to defer consideration of these communications to the 32nd ordinary session to enable them submit written responses to the Respondent States' submissions. The African Commission granted the request and informed the parties accordingly. The Secretariat of the African Commission has written to the Complainants asking them to forward the stated written responses but there has been no reaction from them.
59. In principle the appropriate remedy of those claims submitted to the Claims Commission should be monetary compensation. However, it is also within the Claims Commission's mandate to provide other types of remedies that are acceptable within international practice. It is probable that the African Commission will reach a decision finding the Respondent States in violation of the rights of the individuals on whose behalf Interights is acting. However, as was the case in **Emgba Mekongo Louis/Cameroon** (*Supra*), the African Commission would certainly be constrained

in awarding compensation and may have to refer this matter to the Claims Commission and at which point the matter would certainly be time barred.

60. While the African Commission would have opted to proceed and deal with the instant communications, the Respondent States Parties have assured the African Commission that all the issues before the African Commission will be brought before the Claims Commission.

61. For these reasons, the African Commission decides as follows -:

- To suspend consideration of communication 233/99 and 234/99 *sine die*, and await the decision of the Claims Commission with regard to matters contained in this communication;
- That the Respondent States keep the African Commission regularly informed of the process before the Claims Commission with particular reference to the matters contained in these communications;
- The Republic of Ethiopia and the State of Eritrea are requested to transmit a copy of the text of the decision of the Claims Commission to the Secretariat of the African Commission as soon as it is delivered;
- In the event that the Claims Commission does not fully address the human rights violations contained herein, to reopen the matter for consideration;
- Reserves its decision on the merits of these communications.

***Done at the 33rd Ordinary Session held in Niamey, Niger
from 15th to 29th May 2003***

***COMMUNICATIONS
WITHDRAWN BY THE
COMPLAINANTS***

Rapporteur:

31st Session: Commissioner El Hassan

32nd Session: Commissioner El Hassan

33rd Session: Commissioner El Hassan

Summary of Facts

1. The complaint is filed by the Arab Organisation for Human Rights (AOHR), Egypt on behalf of Professor Saadeddin Mohammed Ibrahim (male, 61), Nadia Mohammed Ahmed Abdel Nour (female, 49), Khaled Ahmed Mohammed Al-Fayyad (male, 29), Usama Hashem Hammad 'Ali (male, 28), Mohammed Hassanein Hassanein 'Amara (male, 49), Magda Ibrahim Ibrahim Al-Bey (female, 41), and Marwa Ibrahim Zaki Ahmed Al Sayyid Gouda (female).
2. This complaint follows the trial and conviction by the Supreme Security Court of the Respondent State in May 2001 of professor Saadeddin Ibrahim, Director and Chair of the Board of Directors of the Ibn Khaldun Center for Development Studies, who was also treasurer of *Hay'at Da'am al-Nakhibat* (Association for the Support of Women Voters, known in Egypt as 'Hoda Association'), together with twenty-seven other persons, including the six other individuals mentioned above. They were all working either as permanent employees or project associates of the two organisations and ten of them were tried *in absentia*.
3. The Complainant alleges that the accused were charged with deliberately disseminating information abroad about the internal situation in the Respondent State damaging its stature contrary to Article 80(d) of the Penal Code, conspiring to bribe public officials to undermine the performance of their duties contrary to Articles 40(2), 40(3), and 48 of the Penal Code, receiving donations from the European Union (EU) without prior permission from the competent authorities contrary to Articles 1(6) and 2(1) of Military Order No. 4 of 1992, using deceptive methods to defraud the EU of funds made available to the two organisations contrary to Article 336 (1) of the Penal Code, and accepting and offering bribes and of forgery of official documents contrary to Articles 103, 104, 107bis, 207, 211, and 214 of the Penal Code. They were convicted and sentenced to several terms of imprisonment ranging from seven years with hard labour to one year suspended terms.
4. In the process of apprehending, trying and convicting the accused, the Complainant alleges that the Respondent State violated their pre-trial and trial rights, freedom of expression, rights to appeal, and rights to effective domestic remedies. Regarding pre-trial violations, the Complainant alleges that Professor Ibrahim, Usama Hamad Ali, and Nadia Abdel Nour were first arrested by officers of the *Mabahith Amn al-Dawla al-'Ulya* (State Security Intelligence) on 30th June 2000. Professor Ibrahim and Nadia Abdel Nour were held in administrative detention without access to judicial supervision or other remedies until 10th

August 2000 when they were released on bail. During this period, no formal charges were brought against them. Usama Hamad 'Ali was initially released on 1st July 2000 but was later re-arrested and similarly held in administrative detention until granted bail in August 2000. No charges were brought against all the accused until 24th September 2000. They were held in sub-human condition and interrogated for unduly long hours. Having been arrested without warrants, Nadia Abdel Nour and Usama Hammad 'Ali were neither informed of the reasons for their arrest nor were they afforded access to their lawyers during interrogation. The former was allowed access to her lawyer only after over three weeks since she first requested for it.

5. Regarding violations during the trial, the Complainant alleges that the accused were denied adequate time and facilities for the conduct of their defence, their defence councils were denied access to the prosecution's evidence. Although the trial began on 18th November 2000, the defence lawyers were granted access to examine the prosecution's evidence on 19th March 2001, by which time they had called most of their witnesses. They were permitted to examine these documents only for three hours and were not allowed to make any copies thereof. In addition, defence lawyers were required to conduct the examination in the presence and under the supervision of staff of the Supreme State Security Prosecution.
6. In May 2001, the prosecution concluded its closing statement to be followed by the introduction of hundreds of pages of additional written evidence by the defence, which the court accepted. On the same day, however, and after adjourning at about 14:00 hours local time for one and half hours, the judges of the Supreme Security Court returned guilty verdicts and announced the sentence. The considered judgement of the Court was out only on 19 June 2001, nearly one month after the conclusion of the trial, thereby denying the accused of their right to appeal against the decision promptly.
7. The Complainant, moreover, alleges that these trials sought to punish the accused for opinions lawfully held and disseminated by them, that there were no domestic remedies for the pre-trial and trial rights violations as Law No. 105 of 1980 setting up the Supreme State Security Courts denies the accused of full rights of appeal, that they could only appeal on procedural points to the Court of Cassation and not on substantive issues, that the Court of Cassation can not acquit the accused in such an appeal, that the said Court of Cassation can only order a re-trial which would effectively subject the accused to second jeopardy, and that an acquittal in an appeal by Cassation can only be ordered should a second appeal against a re-trial is successful.

Complaint

8. The Complainant alleges violation of Articles 5, 6, 7(1)(a-d) and 9(2) of the African Charter on Human and Peoples Rights.
9. The Complainant prays for the African Commission to request the Respondent State to:

- Take steps to vacate the conviction of the accused and take all other steps necessary to ensure adequate redress to the latter due to the violations of Articles 7 and 9(2) of the Charter; and
- Adequately compensate the accused for violation of their rights under Articles 5 and 6 of the Charter;

Procedure

10. The Complaint was dated 24th December 2001 and received at the Secretariat on 26th December 2001 by fax and on 2nd January 2002 by mail.
11. After registering the complaint, the Secretariat learnt that the matter was pending before the Court of Cassation of the Respondent State. On 24th January 2002, the Secretariat wrote to the Complainant acknowledging receipt of the complaint and requesting the latter further clarification on the status of the appeal before the said Court.
12. At its 31st Ordinary Session held from 2nd to 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
13. On 28th May 2002, the Secretariat wrote to the Complainant and the Respondent State of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the African Commission.
14. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission examined the complaint and decided to defer its consideration on admissibility to the 33rd Ordinary Session.
15. On 7th November 2002, the Secretariat wrote to the Complainants and Respondent State to inform them of this decision.
16. The two parties forwarded their submissions on admissibility to the Secretariat each party was given copies of submissions from the other party.
17. On 9th April 2003, the Complainant wrote to the Secretariat informing it that the Court of Cassation in Egypt had acquitted Professor Saadeddin Ibrahim. The Complainant also requested the withdrawal of its Communication concerning Dr Saadeddin Ibrahim.
18. By fax dated 17th April 2003, the Complainant confirmed that its request for withdrawal was made on behalf of all the alleged victims in the Communication.

For the abovementioned reason, the African Commission,

Takes note of the withdrawal of the communication by the Complainant and decides to close the file.

***Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003.***

Rapporteur:

32nd Session: Commissioner El Hassan

33rd Session: Commissioner El Hassan

Summary of Facts

1. The complaint is submitted by Interights representing the Pan-African Movement (PAM), the Legal Resources Consortium (LRC), the Legal Defence and Aid Project (LEDAP) and Recontre Africaine pour la defense des droits de l'homme (RADDHO) who filed the same on behalf of Professor Saadeddin Mohammed Ibrahim, head of the Ibn Khaldun Centre for Development Studies (IKC) and 27 other persons.
2. This complaint follows the trial and conviction by the Supreme Security Court of the Respondent State in May 2001 of professor Saadeddin Ibrahim, Director and Chair of the Board of Directors of the Ibn Khaldun Center for Development Studies, who was also treasurer of *Hay'at Da'am al-Nakhibat* (Association for the Support of Women Voters, known in Egypt as 'Hoda Association'), together with twenty-seven other persons. They were all working either as permanent employees or project associates of the two organisations and ten of them were tried *in absentia*.
3. The complainants allege that the accused were charged with deliberately disseminating information abroad about the internal situation in the Respondent State damaging its stature contrary to Article 80(d) of the Penal Code, conspiring to bribe public officials to undermine the performance of their duties contrary to Articles 40(2), 40(3), and 48 of the Penal Code, receiving donations from the European Union (EU) without prior permission from the competent authorities contrary to Articles 1(6) and 2(1) of Military Order No. 4 of 1992, using deceptive methods to defraud the EU of funds made available to the two organisations contrary to Article 336 (1) of the Penal Code, and accepting and offering bribes and of forgery of official documents contrary to Articles 103, 104, 107bis, 207, 211, and 214 of the Penal Code. They were convicted and sentenced to several terms of imprisonment ranging from seven years with hard labour to one year suspended terms.
4. In the process of apprehending, trying and convicting the accused, the Complainants allege that the Respondent State violated their pre-trial and trial rights, freedom of expression, rights to appeal, and rights to effective domestic remedies.

Complaint

5. The Complainants allege violations of Articles 2, 3, 4, 5, 6, 7(1), 9(2), 13(1), 16(1) and (2) and 26 of the African Charter on Human and Peoples Rights.

Procedure

6. The Complaint was dated 4th October 2002 and received at the Secretariat on 9th October 2002 by mail.
7. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
8. On 4th November 2002, the Secretariat wrote to the complainant and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility to the Secretariat before the 33rd Ordinary Session of the African Commission.
9. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission heard the Complainant's oral submissions on the matter, during which the latter made an explicit oral request to the African Commission to withdraw the Communication. The Complainant also stated it will send its written request for the same soon.

For the abovementioned reason the African Commission,

Takes note of the withdrawal of the communication by the Complainant and decides to close the file.

***Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003.***

***COMMUNICATIONS
DECLARED
INADMISSIBLE***

247/2002 – Institute for Human Rights and Development in Africa (on behalf of Jean Simbarakiye) / Democratic Republic of Congo

Rapporteur:

31st Session: Commissioner Angela Melo

32nd Session: Commissioner Angela Melo

33rd Session: Commissioner Angela Melo

Summary of Facts:

1. The Complainant, Mr Jean Simbarakiye, is a national of Burundi currently a refugee in Lomé, Togo.
2. He is assisted by the Institute for Human Rights and Development in Africa, an NGO with observer status with the African Commission, with its head office at Banjul, Gambia, P.O. Box 1896, Tel. 220 962280/954131, Fax: 220 49 41 78, Email:info@africaninstitute.org; Website:WWW.AFRICANEINSTITUTE.ORG. Mr Jean Simbarakiye states that :-
3. He arrived in Zaire, now Democratic Republic of Congo, in 1974 where he obtained the status of political refugee granted and recognised by the Republic of Zaire and the United Nations High Commission for Refugees.
4. He did his University studies there up to 1984 and, in 1989, he was employed as a civil electrical engineer by Office National des Transports (ONATRA) for and on behalf of the State of Zaire.
5. In 1996, following the war between the Democratic Republic of Congo and Burundi, Uganda and Rwanda in the East of the country, the Haut Conseil de la République, i.e. the Transitional Parliament, during its session held on 31st October 1996, adopted Resolution No. 04/HCR6PT/96 by which it was decided to “terminate work contracts for all Rwandan, Burundian and Ugandan subjects...”
6. Pursuant to this decision, Mr. Jean Simbarakiye was dismissed on 3^d January 1997, without prior notice nor compensation, by ONATRA, for the sole reason of being of Burundi origin.
7. He has three children, and his wife is a Congolese (DRC) national.
8. The communication also alleges also that from January 1997, when he was dismissed without prior notice or compensation, to June 1997, when he left DRC, Mr Simbarakiye made numerous but unsuccessful attempts to obtain justice by approaching the Congolese Authorities.

9. Due to moral and material pressure, he was forced to leave DRC in June 1997 and took refuge in Lomé, Togo, where he continued enjoying the status of refugee, without having exhausted local remedies.
10. He continued his contacts with the Chargé d'Affaires of DRC in Lomé and, through him, sent a letter on 21st February 2000 to the Minister of Justice of DRC but, all in all, all his efforts, just like those of his wife after he left DRC in June 1997 till her own departure for Lomé in 2000, were not fruitful.

The Complaint

11. The communication alleges Resolution No. 4 of the Haut Conseil de la République, the Transitional Parliament of the Democratic Republic of Congo violates Articles 1, 2, 3, 7, 14, 15 and 18 of the African Charter.

Procedure

12. The communication was received by the Secretariat of the African Commission on 3rd April 2002, which acknowledged receipt of the same to Counsel of the Complainant, the Institute for Human Rights and Development on 4th April 2002.
13. At its 31st Ordinary Session held in Pretoria, South Africa, from 2nd to 16th May 2002, the African Commission decided to be seized of the communication and referred consideration of the admissibility of the case to its 32nd Ordinary Session.
14. The Secretariat informed the concerned parties through a Note Verbale and a letter dated 27th June 2002. In response, the Complainant, through his counsel, filed his submissions on the admissibility of the communication, which were received at the Secretariat of the African Commission on 12/8/2002.
15. The Government of DRC, through H.E. the Minister for Human Rights, acknowledged receipt of the correspondence from the Secretariat of the African Commission concerning the communication by a letter dated 20th July 2002 and referenced 737 and which was received at the Secretariat on 26th December 2002.
16. The DRC delegation to the 32nd Ordinary Session of the African Commission held in Banjul, The Gambia, from 17th to 23rd October 2002, handed to the Secretariat of the African Commission the submissions of the Government on the admissibility of Communication 247/2002.
17. The African Commission deferred consideration of the communication to its 33rd Ordinary Session scheduled for Niamey, Niger, from 15th to 29th May 2003.
18. By Note Verbale and a letter dated 2nd December 2002, the Secretariat of the African Commission informed the parties of the African Commission's decision and forwarded the documents submitted by each of the parties.
19. On 31st January 2003, the Complainant sent to the Secretariat written submissions in reply to the submissions of the Government of DRC.

20. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

K. LAW

Admissibility

21. The Complainant alleges that he did not exhaust local remedies because he was subjected to moral and material pressure.
22. The Government of DRC submitted that he did not provide proof of the impracticability to exhaust local remedies while he was in the DRC and in Lomé, Togo, in June 1997.
23. In fact, the Government of DRC explains that local remedies exist and are available and that even in Togo, the Complainant had the possibility of taking legal action before bringing the matter before the African Commission.
24. Article 56(5) of the African Charter on Human and Peoples' Rights requires that communications sent to the African Commission shall be considered if they " are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged."
25. Article 56 aims thus at enabling, among others, the Respondent Government to be aware of the harmful effects of its actions on human rights and look into the possibility of taking corrective measures before being sued to an international court.
26. As far as the African Commission is concerned, the existence of a local remedy should be both theoretical and practical, a condition without which the local remedy in question would be neither available nor effective.
27. Such is the case when, for objective reasons, the Complainant cannot take his case to the courts of the Respondent State in conditions that guarantee him a fair trial.
28. The African Commission has indeed never admitted that the condition of exhaustion of local remedies apply ipso facto for receiving a communication, when it finds it illogical to require the exhaustion of local remedies.
29. To support his allegations relating to the impossibility for him to exhaust local remedies, the Complainant exhaustively referred to the African Commission's previous decisions through the following communications -:
 - Communication 39/90: Annette Pagnoule on behalf of Abdoulaye Mazou/Cameroun²⁶;
 - Communication 103/93: Alhassan Abubakar/Ghana²⁷

²⁶ **Communication 39/90: Annette Pagnoule on behalf of Abdoulaye Mazou/Cameroun.** The Complainant had taken numerous legal actions both non contentious and contentious without any success. The Commission felt then that local remedies had been exhausted.

²⁷ **Communication 103/93: - Alhassane Aboubacar/Ghana:** the Complainant was sentenced and sent to prison. Following his escape from prison, he took refuge abroad and seized the African Commission.

- Communications No. 147/95 and 149/96²⁸;
- Communications (consolidated) 25/89, 47/90, 56/91, 100/94²⁹ - Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Internationale des Droits de l'Homme, Les Témoins de Jéhovah/Zaire;
- Communication 71/92³⁰: Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia ; and
- Communication 74/92³¹ - Commission Nationale des Droits de l'Homme et des Libertés/Chad.

30. The African Commission feels that none of these communications are identical with the communication brought by the Complainant who, moreover did not attempt to exhaust local remedies prior to bringing the matter before the African Commission in 2002.

31. Considering that he left DRC in June 1997, there is no indication that he attempted to exhaust local remedies whilst in Togo nor did his wife (who remained in DRC until November 2002) attempt to take any action to exhaust local remedies.

32. Furthermore, the Complainant does not provide evidence showing the moral and material constraints alleged to have prevented him from exhausting local remedies available under the laws of DRC.

33. For these reasons, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible for non-exhaustion of local remedies.

***Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003***

The African Commission felt that it was not logical to ask him to return and exhaust local remedies in Ghana.

²⁸ **Communication 147/95 and 149/96 – Dawda Jawara/The Gambia** The Complainant was a Head of State who had been toppled and sentenced in absentia. The African Commission felt that local remedies were not available and that in such conditions, it was not logical to ask him to return to The Gambia to exhaust local remedies.

²⁹ **Communications (consolidated) 25/89, 47/90, 56/91, 100/94:** Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Internationale des Droits de l'Homme, Les Témoins de Jéhovah/Zaire. Considering that the condition of exhaustion of local remedies was not applicable to the letter when it is neither practical nor desirable that the Complainant seizes the courts for each violation, the African Commission declared the consolidated communications admissible due to the nature of the violations which were serious and massive violations of human rights.

³⁰ **Communication 71/92 – Rencontre Africaine pour la Défense des Droits de l'Homme/Zambia:** The Commission felt that the condition of exhaustion of local remedies does not mean that Complainants must exhaust local remedies when, in practical terms, these are neither available nor practical.

³¹ **Communication No. 71/92 – Commission Nationale des Droits de l'Homme et des Libertés/Chad.** The African Commission felt that it could not be asked of the Complainant to exhaust local remedies when he would not be in a position to seize the national courts.

Rapporteur:

32nd Session: Commissioner Johm

33rd Session: Commissioner Johm

Summary of Facts:

1. The complaint is filed by Stephen O. Aigbe, Master Warrant Officer (MWO) in the Nigerian Army.
2. The complaint details the mistreatment of the Complainant by the Nigerian Army. On 17 January 1996, the Complainant claims that he was removed from his office, arbitrarily detained, and accused of trying to overthrow General Abacha. On 12 April 1996 and 12 September 1996, he was arraigned on 12 counts of mutiny, a capital charge. He alleges that despite certain authorities' observations that the charges were false, he was not acquitted and the charges are still pending in a faulty trial process. The "rule of laws and court procedures" should have been "followed and exhausted" by officials before "a Judge takes far reaching decisions on any matter." According to the Complainant, the proceedings violated the rule of law by not following armed forces regulations, which call for investigation and then court martial.
3. The Complainant also alleges several violations in relation to his terms of military service. He alleges that "several colleagues burgled his barracks" and despite his complaint to the relevant authority, his case was never investigated. In addition, he was denied living accommodations in the barracks for two years and was denied "the right to reach [his] pay point since July 1999" and to take his leave for six years.
4. The Complainant also claims he faces death threats from "subordinate soldiers and the affluent Generals." He claims "harassment, intimidation, humiliation, embarrassment, discrimination, annihilation and threats to [his] life." In addition to death threats, he alleges daily occurrences of "other acts of organized open intimidation [by soldiers and generals]."
5. He alleges that he has sought redress before several authorities, pursuant to Armed Forces Decree No. 105 of 1993, but certain officers were obstructing his access to justice. Despite his detailed submissions, the authorities have failed to provide adequate redress for his grievances and have bluntly refused to give him "audience at any level," violating military and constitutional procedure. He claims that bribery played a role in keeping his case from being heard.

6. He further alleges that his family has been involved in occult practices and that members of the military, who are also involved, conspired against him. He notes that he wrote “so many petitions and protest letters to the Nigerian Army Council” and to the Oputa Panel.

Complaint

7. The Complainant alleges violations of Articles 4, 5, 6, and 7(1)(a), (b), (c), and (d) of the Charter.
8. In his prayer for redress, the Complainant requests that the African Commission:
 - Intervene quickly to save him and his family from “the risk of assassination or extra-judicial killing or torture to death”;
 - Help restore contact with his children after “full and impartial investigations into all allegations of state agents in his separation [from his children], cult acts and practices for government by [his] children and [his] legal wife”;
 - Write to the Nigerian Attorney General and Minister of Justice to request an investigation into the mutiny allegations that he faces;
 - Call for an independent, impartial and public investigation into the burgling of his barracks;
 - Call for a probe into the “reallocation of [his] motorcycle loan to another soldier”;
 - Assist him in seeking asylum outside Nigeria since he faces continuous persecution there; and
 - Send him 10,000 Naira to enable him to eat.

Procedure

9. The undated Complaint was received at the Secretariat on 14th June 2002 by mail.
10. On 24th July 2002, the Secretariat wrote to the Complainant informing him that the Complaint was registered and that it will be considered at the African Commission’s 32nd Ordinary Session, which was scheduled to take place from 17th to 31st October 2002 in Banjul, The Gambia.
11. At its 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, the African Commission considered the complaint and decided to be seized thereof.
12. On 4th November 2002, the Secretariat wrote to the parties to inform them of this decision and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the African Commission.
13. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

LAW

Admissibility

14. Article 56 (5) of the African Charter requires that "*a communication be introduced subsequent to exhaustion of local remedies, if they exist, unless it is obvious to the Commission that the procedure for such recourse is abnormally prolonged*".
15. The Complainant had alleged that he sought redress before "several authorities." The African Commission has no indication in the file before it that there was any proceeding before the domestic courts on the matter.
16. The Complainant has, despite repeated requests, however, not furnished his submissions on admissibility, especially on the question of exhaustion of domestic remedies.

For these reasons, and in accordance with Article 56(5) of the African Charter, the African Commission,

Declares this communication inadmissible due to non-exhaustion of local remedies.

***Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003***

254/02 Mouvement des Réfugiés Mauritaniens in Senegal/Senegal

Rapporteur:

32nd Session: Commissioner Sawadogo

33rd Session: Commissioner Sawadogo

Summary of Facts

1. The Complainant alleges that on the eve of the demonstration by the refugees of Podor in commemoration of the International Refugee Day, the Prefect of the town of Podor banned the said demonstration.
2. The Complainant does not show whether he had complied with the necessary procedures to obtain authorisation for the demonstration. He however points out that he had sent the programme of the demonstration to the following institutions and persons -:
3. African Commission on Human and People's Rights; United Nations High Commissioner for Refugees; Commission for Assistance to Returnees and Displaced Persons; Governor of Saint-Louis; Prefect of Podor; Deputy Prefect of Thille Boubacar and the Press.
4. The text of the decision of the Prefect of Podor banning the demonstration which was scheduled to take place on Thursday 20th and Friday 21st June 2002 in the towns of Madina Moussa, Diolly, Podor and Ngaolé was dated 19th June 2002, citing the need to keep law and order as the reason for this action.
5. The submission of the Complainant includes the programme of the demonstration sent to the above mentioned institutions and persons, the decision of the Prefect of Podor dated 19th June 2002 banning the demonstration scheduled to take place on Thursday 20th and Friday 21st June 2002 in towns of Madina Moussa, Diolly, Podor and Ngaolé.

Complaint

6. The Complainant alleges that Senegal violated Articles 5, 9 and 11 of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the African Commission on 6th August 2002.

8. On 12th August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed the Complainant that the complaint was registered and would be considered at the 32nd Ordinary Session scheduled to take place in Banjul, The Gambia, from 17th to 31st October 2002.
9. At the 32nd Ordinary Session held from 17th to 23rd October 2002 in Banjul, The Gambia, after considering the communication, the African Commission decided to be seized with the said communication.
10. On 30th October 2002, the Secretariat of the African Commission informed the parties of the above-mentioned decision and asked them to provide it with more information on the admissibility of the communication, in accordance with Article 56 of the African Charter. It also sent a copy of the communication to the respondent State. It requested the parties to send their written observations to the Secretariat within two months after notification of the decision.
11. At its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger, the African Commission considered this communication and declared it inadmissible.

LAW

Admissibility

12. The admissibility of the communications submitted under Article 56 of the African Charter is governed by the conditions set out in Article 56 of the African Charter. The applicable provision in this particular case is that of Article 56(5) which 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...”.
13. In the case under consideration, the Complainant alleges that on the eve of the demonstration for the commemoration of the International Refugee Day, the Prefect of the town of Podor issued a ban of the demonstration by Mauritanian refugees.
14. The Complainant filed the decision of the Prefect of Podor banning the demonstration scheduled to take place on 20th and 21st June 2002 in the towns of Madina Moussa, Diolly, Podor and Ngaolé.
15. In the Complainant’s written observations, it is alleged that according to the information received, the procedure applied in such a case by Conseil d’Etat would be unduly prolonged, but without elaborating how.
16. In its response, the Respondent State refers to the provisions of Article 56 of the African Charter and Rule 116 of its Rules of Procedure which provides for the exhaustion of local remedies as a requirement for the African Commission to rule on the admissibility of communications.

17. The Respondent State also recalls that the guidelines for submission of communications provide that each communication should particularly indicate that local remedies have been exhausted.
18. The representative of the Respondent State stated during the 33rd Ordinary Session that the Complainant had not undertaken any efforts to challenge the decision banning the demonstration.
19. She pointed out the decision complained of was an administrative measure against which the Complainant could have taken legal action and obtained redress in the following 2 ways -:
 - a. **Appeal to a higher administrative authority** which consists of seizing the hierarchical authority for abuse of authority, including the Governor, the Minister of Interior, the Prime Minister and, finally, the President of the Republic in accordance with the Institutional Act No. 92-24 of 30th May 1992 relating to Conseil d'Etat as amended and Article 729 of the Code of Civil Procedure;
 - b. **Administrative-law action**, through seizure of Conseil d'Etat cancelling the administrative decision complained of for abuse of authority.
20. The representative of the Respondent State demonstrated that these local remedies existed but that the Complainant had not utilised any of them. She further pointed out that in emergency cases, the procedure of hour by hour interim order in an urgent case was also available to those seeking justice. She therefore concluded that the Complainant had not exhausted local remedies.
21. In light of the above submissions, the African Commission notes that the Complainant did not provide proof of attempting to exhaust the local remedies that were available to him.

For these reasons, the African Commission,

Declares the communication inadmissible for non-exhaustion of local remedies.

***Done at the 33rd Ordinary Session held in Niamey, Niger,
from 15th to 29th May 2003.***

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