

**SEVENTEENTH ANNUAL ACTIVITY REPORT OF THE
AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS
2003 - 2004**

I. ORGANISATION OF WORK

A. Period covered by the Report

1. The Sixteenth Annual Activity Report was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union meeting in July 2003 in Maputo, Mozambique.

The Seventeenth Annual Activity Report covers the 34th and the 35th Ordinary Sessions of the African Commission held from 6th to 20th November 2003 and from 21st May to 4th June 2004 respectively in Banjul, The Gambia.

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 Sixteenth Annual Activity Report in July 2003, the African Commission has held two Ordinary Sessions.

The agenda of the abovementioned sessions can be found on the Website of the African Commission, which is www.achpr.org

D. Composition and participation

4. In accordance with Rule 17 of its Rules of Procedure, the African Commission during the 34th Ordinary Session, elected its Bureau to serve for a term of two years. Commissioner Salamata Sawadogo was elected Chairperson and Commissioner Yassir Sid Ahmed El Hassan was elected Vice-Chairperson.

5. The following Members of the African Commission participated in the deliberations of the 34th and 35th Ordinary Sessions -:

- Commissioner Salimata Sawadogo (Chairperson);
- Commissioner Yassir Sid Ahmed El Hassan (Vice-Chairperson);
- Commissioner Mohammed Abdulahi Ould Babana;
- Commissioner Andrew R Chigovera;
- Commissioner Vera M Chirwa;
- Commissioner E.V.O. Dankwa;
- Commissioner Angela Melo ;
- Commissioner Jainaba Johm;
- Commissioner Sanji Mmasenono Monageng;
- Commissioner Bahame Tom Mukirya Nyanduga;
- Commissioner M. Kamel Rezag-Bara.

6. During the 34th Ordinary Session the following three new members of the African Commission, elected during the 2nd Ordinary Session of the Assembly of Heads of State and Government of the African Union held in Maputo, Mozambique in July 2003, took their oath of office:-
 - Mrs Sanji Mmasenono Monageng
 - Mr. Bahame Tom Mukirya Nyanduga
 - Mr. Mohammed Abdulahi Ould Babana

7. Representatives from the following twenty six (26) Member States participated in the deliberations of the 34th Ordinary Session and made statements, namely, -:

Algeria, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Congo, Cote D'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Gabon, The Gambia, Guinea, Guinea Bissau, Kenya, Libya, Mali, Rwanda, Senegal Sudan, South Africa, Tunisia and Zimbabwe

8. Representatives from the following twenty six (26) Member States participated in the deliberations of the 35th Ordinary Session and made statements -:

Algeria, Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Congo, Cote D'Ivoire, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Guinea Bissau, Kenya, Kingdom Lesotho, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Senegal, Republic of South Africa, Sudan, Tanzania, Tunisia and Zimbabwe.

9. 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

10. The African Commission considered and adopted its Seventeenth Annual Activity Report at its 35th Ordinary Session.

II. ACTIVITIES OF THE AFRICAN COMMISSION

A. Retreat of Members of the African Commission

11. The Retreat of Members of the African Commission facilitated by the Office of the High Commissioner for Human Rights (OHCHR), was held from 24th to 26th September 2003 in Addis Ababa, Ethiopia. Twenty-eight participants comprising members of the African Commission, members of the NEPAD APRM Panel of Eminent Persons, Chairperson of the African Coordinating Committee of National Institutions, Vice Chairperson of the African Committee on the Rights and Welfare of the Child, Representatives of the African Union (AU) units and programmes such as CSSDCA as well as representatives of partner institutions and the donor community participated in the Meeting.

12. Issues discussed at the Retreat included the consideration of States Reports, the handling of communications, the relationship between the African Commission and the African Union, and the relationship between the African Commission

with other bodies of the African Human Rights System and the initiatives of the African Union.

13. At the 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission discussed the Report of the Retreat and adopted it. At its 35th Ordinary Session held in May to June 2004 in Banjul, The Gambia, Members of the African Commission continued reflecting on how to implement the recommendations suggested in the Report.

B. Commemoration of the tenth (10th) Anniversary of the Rwanda Genocide

14. The Executive Council of the African Union in its Decision on the 10th Anniversary of the Rwandan Genocide – Decision 16(II), decided that the Commission of the African Union should commemorate the 10th Anniversary of the Rwandan Genocide, being 7th April 2004 as a day of remembrance of the victims of the genocide in Rwanda and reaffirmation of Africa's resolve to prevent and fight genocide on the continent.
15. On 7th April 2004, the Secretariat of the African Commission commemorated this event in Banjul, The Gambia at the Kairaba Hotel. Members of the Diplomatic Corps, Representatives from the UN Specialised Agencies based in the Gambia, Civil Society NGOs and the public were invited and participated in this event. A minute of silence was observed in remembrance of the victims of the genocide and a panel discussion held to discuss and reflect on the events that happened 10 years ago in Rwanda with a resolve never to let it happen again.

C. Consideration of Initial/Periodic Reports of State Parties

16. 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 African Charter, a report on legislative and other measures taken with a view to giving effect to the rights and freedoms guaranteed under the African Charter.
17. The status of submission of Initial and Periodic reports by States Parties is contained in **Annex I** of this report.
18. At its 34th Ordinary Session, the African Commission examined the following reports -:
 - Initial Report of the Democratic Republic of Congo (combining all the overdue reports);
 - Periodic Report of the Republic of Senegal (combining all the overdue reports).
19. At its 35th Ordinary Session, the African Commission examined the following reports -:
 - Initial Report of the Republic of Niger (combining all the overdue reports);
 - Periodic Report of the Republic of Sudan;
 - Periodic Report of Burkina Faso.

20. The African Commission expressed its satisfaction with the dialogue that took place between itself and the delegations from the Democratic Republic of Congo, the Republic of Senegal, Republic of Niger, Republic of Sudan and Burkina Faso and encouraged the States Parties to continue their efforts in fulfilling their obligations under the African Charter.
21. The African Commission adopted Concluding Observations on the five (5) State Reports which will be published together with the reports.
22. 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.

D. Promotional Activities

23. All the Members of the African Commission undertook promotional activities during the inter-sessions. The activities could be classified as follows -:
 - Promotional missions were undertaken to the following Member States, Democratic Republic of Congo, Rwanda, Burundi, Sierra Leone and Mali;
 - Seminars and Workshops;
 - Conferences, Lectures and Training;
 - Sensitisation on the ratification of the Protocols on the African Court and on the Rights on Women Africa;
 - Thematic issues such as freedom of expression, prevention and prohibition of torture, situation of refugees and displaced persons, prisons and conditions of detention in Africa, situation of women in Africa and situation of indigenous populations/communities in Africa
24. Inter-session activity reports of the Commissioners can be found on the website of the African Commission.
25. The African Commission at its 34th and 35th Ordinary Sessions adopted the following Mission Reports -:
 - *Reports of Promotional Missions undertaken to the following Member States:-*
 - Cote D'Ivoire – 2nd to 4th April 2001**
 - Seychelles – 2nd to 6th July 2001**
 - Djibouti – 9th to 11th September 2002**
 - Niger – 10th to 17th March 2002**
 - Libya – 17th to 23rd March 2002**
 - *Report of the Fact-finding Mission to :-*
 - Zimbabwe – 24th to 28th June 2002**

The Executive Summary of the Report of the Fact-finding Mission is contained in **Annex II** of this Report.

 - *Report of the Mission of the Special Rapporteur on Prisons and Conditions of Detention in Africa to :-*
 - Benin – 24th January to 5th February 2003**

➤ *Report of the High Level Mission to -:*
Cote D'Ivoire – 24th to 26th April 2003

26. The distribution of State Parties among Commissioners for their promotion activities is contained in **Annex III** of the report.

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

27. Penal Reform International (PRI) the principal donor for the office of the Special Rapporteur on Prisons and Conditions of Detention in Africa discontinued its provision of financial support to the Special Rapporteur. PRI however, negotiated with the Foreign and Commonwealth Office (FCO) for the recruitment of an assistant who is on a seventeen months contract and assumed duty in June 2003.

28. Thus during the period under review, the Special Rapporteur, Commissioner Vera Chirwa was constrained in terms of the activities she could undertake because of the poor financial situation of the African Commission. The following are the activities she was able to undertake -:

- Drew up a strategic plan for the next three years and prioritised activities to be undertaken within the next twelve months;
- Undertook visits to prisons and places of detention in Ethiopia from 15th to 29th March 2004 and in Lilongwe, Malawi;
- Followed up on the implementation of the recommendations made during her visit to the prisons in Uganda in March 2002. Uganda indicated the difficulties faced in implementing some of the recommendations and requested the African Commission to assist it in implementing them.

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

29. During the period under review, the Special Rapporteur on the Rights of Women, Commissioner Dr. Melo placed special emphasis on the process of adopting and ratifying the Protocol on the Rights of Women in Africa.

30. The Special Rapporteur undertook a Mission to Sao Tome and Principe from 15th to 19th March 2004. In addition the Special Rapporteur undertook the following activities -:

- Mobilised funds, established contacts with potential donors with a view to financing the activities of the Special Rapporteur;
- Participated in meetings on strategies for the speedy ratification of the Protocol on the Rights of Women in Africa;

31. The Special Rapporteur carried out the following activities geared towards its speedy ratification by Member States following its adoption by the Assembly of Heads of State and Government in July 2003 and sent letters to -:

- The Chairperson of the Committee of Permanent Representatives in Addis Ababa to sensitise her and her colleagues with a view to seeking the speedy ratification of the Protocol in their respective countries;

- The Current Chairperson of the African Union (AU), H.E. Mr. Joaquim Chissano requesting him to encourage Member States of the AU to ratify the Protocol;
- The Parliament, the Special Commission in charge of Social Affairs, the Commission on Legality and Human Rights, the Minister of Women's Affairs and Social Welfare of Mozambique and the Ministry of Foreign Affairs of Mozambique requesting them to start of the process of ratifying the Protocol;
- All Members of the African Commission requesting them to encourage their governments to ratify the Protocol;
- Headquarters of organisations and regional economic communities such as COMESA, UEMOA, IGAD and SADC requesting them to encourage their Member States to ratify the Protocol.

(c) Special Mechanisms of the African Commission

Focal Persons of the African Commission

32. Because the Special Rapporteur Mechanism of the African Commission was not very successful, the African Commission decided to undertake a review of this Mechanism. However, there were projects already underway between the African Commission and its partners. In view of this, the African Commission decided to appoint focal persons as a stop gap measure until such a time when the African Commission had finalised its review of the special rapporteur mechanism. In this regard, at the 34th Ordinary Session, the African Commission appointed the following Members of the African Commission as Focal Persons -:
 - Commissioner Andrew Ranganayi Chigovera – Focal Person on Freedom of Expression;
 - Commissioner Jainaba Johm – Focal Person on Human Rights Defenders in Africa;
 - Commissioner Bahame Tom Mukirya Nyanduga – Focal Person on Refugees and Displaced Persons in Africa;
 - Commissioner Sanji Mmasenono Monageng – Focal Person for the implementation of the Guidelines on the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines).
33. The Bureau of the African Commission considered the Report submitted by Commissioner Pityana on the review of the mechanism of the Special Rapporteur and drafted Guidelines for its review. At its 35th Ordinary Session, the African Commission considered the Guidelines drafted by the Bureau of the African Commission and adopted them.
34. The African Commission nominated the following Members of the African Commission as Special Rapporteurs -:
 - Commissioner Bahame Tom Mukirya Nyanduga - Special Rapporteur on Refugees and Internally Displaced Persons in Africa;
 - Commissioner Jainaba Johm – Special Rapporteur on Human Rights Defenders in Africa.

35. In conformity with its Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa adopted at the 32nd Ordinary Session, the African Commission at its 35th Ordinary Session nominated Members of the Follow Up Committee on the Guidelines. The Follow Up Committee is chaired by Commissioner Sanji Mmasenono Monageng and is composed of the following African Experts -:
- Mr. Jean Bapiste Niyizurugero – Association for the Prevention of Torture (APT);
 - Mrs Hannah Forster – African Centre for Democracy and Human Rights Studies (ACDHRS);
 - Mrs Leila Zerrougui – Magistrate and Professor of Law at the National Institute of Magistracy in Algiers and Member of the United Nations Sub-Commission on the Promotion and Protection of Human Rights;
 - Advocate Karen McKenzie – Independent Complaints Directorate of South Africa.

(d) Seminars and Conferences held

NGO Forum

36. 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 34th and 35th Ordinary Sessions to prepare human rights NGOs for participation in the Ordinary Sessions of the African Commission.

All Africa Conference on Freedom of Expression

37. The African Commission in collaboration with ARTICLE 19, Media Institute for Southern Africa and Media Foundation for West Africa organised an All Africa Conference on Freedom of Expression with support from the Foreign and Commonwealth Office and the Open Society Initiative for Southern Africa. The Conference was held from 19th to 20th February 2004 in Pretoria, South Africa and brought together representatives from Member States, intergovernmental organisations, national human rights institutions, academia, national media regulatory bodies, the media and human rights and media advocacy NGOs. The main objective of the Conference was to raise awareness about the Declaration and other international standards relating to freedom of expression. In addition, the Conference discussed the activities of the African Commission with a view to enhancing its capacity to promote and protect the right to free expression.

Consultative Workshop on the Role of the Focal Point on Human Rights Defenders in Africa

38. Following her nomination as Focal Person on Human Rights Defenders in Africa Commissioner Jainaba Johm convened a Consultative Meeting in order to draw up her Terms of Reference and plan of activities for the duration of her mandate. The Consultative Meeting was held from 19th to 20th March 2004 in Banjul, The Gambia and brought together experts in the field of human rights defenders

from the UN Office of the High Commissioner for Human Rights, the Inter-American Commission on Human Rights and international and African human rights organisations.

Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa

39. In keeping with its decision made at the 33rd Ordinary Session, the African Commission in collaboration with the Association for the Prevention of Torture (APT) decided to launch and publicise the Robben Island Guidelines in a parallel event during the African Union Assembly of Heads of State and Government in July 2003 in Maputo, Mozambique. The launch of the Robben Island Guidelines took place on 11th July 2003 in Maputo, Mozambique.
40. Following the nomination of Commissioner Sanji Mmasenono Monageng as the Focal Person for the implementation of the Robben Island Guidelines, the African Commission in collaboration with APT held a Consultative Meeting on the implementation of the Robben Island Guidelines. At the invitation of the government of Burkina Faso, the Consultative Meeting took place in Ouagadougou, Burkina Faso, from 8th to 9th December 2003.

Indigenous Populations/Communities in Africa

41. At the 34th Ordinary Session of the African Commission, the Working Group of Experts on Indigenous Populations/Communities in Africa presented its report to the African Commission in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa' that was adopted by the African Commission at its 28th Ordinary Session held in Cotonou, Benin, in October 2000.
42. The Report of the Working Group was adopted by a resolution which further established a Working Group of Experts for an initial term of 2 years with the mandate to promote and protect the rights of indigenous populations/communities in Africa.

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

43. At its 34th Ordinary Session, the African Commission discussed and adopted the Modalities for the Operationalisation of the Memorandum of Understanding (MOU) between the African Commission and the UNHCR **(See Annex IV)**.
44. Following his appointment as the Focal Person charged with the responsibility to ensure the implementation of the MoU, Commissioner Bahame Tom Mukirya Nyanduga met with officials from UNHCR Regional Liaison Office in Addis Ababa, Ethiopia from 17th to 18th May 2004. The Meeting developed a more detailed plan of future activities to be undertaken based on the areas of interaction laid out in the modalities of operationalisation of the MoU.

Seminars and Conferences to be organised

45. In accordance with its Strategic Plan of 2003 to 2006 the African Commission resolved to organise a number of Seminars and Conferences as part of its promotional activities¹.
46. The Seminar on *Economic, Social and Cultural Rights* scheduled to take place from 20th to 24th September 2003 in Cairo, Egypt did not take place due to lack of funding. Funding for the Seminar has been secured and arrangements are underway to hold the Seminar **in September 2004**.
47. 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.

E. Ratification of the Protocol to the African Charter on the Rights of Women in Africa

48. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the 2nd Ordinary Session of the Assembly of Heads of State and Government on 11th July 2003 in Maputo, Mozambique.
49. While twenty nine (29) Member States have signed the Protocol, only one (1) Member State – Comoros, has ratified the Protocol and deposited its instruments of ratification with the Commission of the African Union. The African Commission urges Member States to ratify the said Protocol and calls upon human rights organisations to encourage States Parties to quickly ratify this important instrument in order for it to come into force.

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

50. The requisite fifteen (15) instruments of ratification were deposited with the Commission of the African Union and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights entered into force on 25th January 2004. The following are the fifteen (15) Member States that have ratified the Protocol, namely, Algeria, Burkina Faso, Burundi, Côte d'Ivoire, Comoros, The Gambia, Lesotho, Libya, Mali, Mauritius, Senegal, Republic of South Africa, Rwanda, Togo and Uganda.
51. The African Commission continues to urge Member States that have not yet done so, to ratify the said Protocol and calls upon human rights organisations to encourage States Parties to quickly ratify this instrument.

¹ The list of the Seminars and Conferences to be organised can be found on the African Commission's website, which is, www.achpr.org.

G. Adoption of Resolutions

52. At its 34th Ordinary Session, the African Commission adopted the following Resolutions -:
- Resolution on the adoption of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities;
 - Resolution on the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa;
 - Resolution on the Adoption of the "Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa".
53. At its 35th Ordinary Session, the African Commission adopted the following Resolutions -:
- Resolution on the Protection of Human Rights Defenders in Africa;
 - Resolution on the situation of human rights in Cote D'Ivoire;
 - Resolution on the situation of human rights in Darfur, Sudan;
 - Resolution on the situation of human rights in Nigeria;
 - Resolution on the Situation of Women and Children in Africa.

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

54. At its 34th Ordinary Session, the African Commission adopted the following documents² -:
- The Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities in Africa;
 - The Ouagadougou Plan of Action and Declaration on Accelerating Penal Reform in Africa.

H. Relations with observers

55. At its 34th and 35th 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.
56. At its 35th Ordinary Session, the African Commission granted Affiliate Status to three (3) National Human Rights Institutions³. This brings the number of National Human Rights Institutions to which the African Commission has granted affiliate status to fifteen (15).
57. The African Commission reiterated its appeal to States Parties to create National Human Rights Institutions and strengthen the capacities of those already in existence.
58. At its 34th and 35th Ordinary Sessions, the African Commission granted Observer Status to thirteen (13) NGOs⁴.

² The texts of the abovementioned documents are available at the Secretariat of the African Commission. They can also be found on the Website of the African Commission, which is www.achpr.org.

³ This brings the number of National Human Rights Institutions to which the African Commission has granted affiliate status to fifteen (15).

⁴ This brings the total number of NGOs granted Observer Status with the African Commission to three hundred and fourteen (314) as at 4th June 2004.

I. Protection Activities

59. At its 34th Ordinary Session, the African Commission considered thirty two (32) communications and was seized of eleven (11) new communications. It delivered decisions on the merits on three (3) communications, declared two (2) communications inadmissible and deferred further consideration on twenty seven (27) communications to the 35th Ordinary Session.
60. At its 35th Ordinary Session, the African Commission considered thirty eight (38) communications and was seized of four (4) communications. It delivered decisions on the merits on three (3) communications and declared two (2) communications inadmissible. One (1) communication was withdrawn at the request of the Complainant and the filed closed. Thirty two (32) communications were deferred to the 36th Ordinary Session for further consideration.

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

J. Administrative and Financial Matters

a) Administrative Matters

61. At the 34th and 35th Ordinary Sessions of the African Commission, the Secretary to the African Commission presented his report on the financial and administrative situation of the Secretariat. He reported on the administrative situation of the Secretariat and the situation of the members of staff serving at the Secretariat of the African Commission. Members of the African Commission discussed this matter extensively.

b) Financial matters

A.U Budget

62. Under Article 41 of the African Charter, the General Secretariat of the OAU (now the Commission of the African Union) is responsible for meeting the costs of the African Commission's operations including provision of staff, resources and services.

Extra-Budgetary Funds

63. In order to complement the limited resources allocated by the African Union, the African Commission continues to solicit for financial and material assistance and presently receives such assistance from the following partners -:

a) The Danish Institute for Human Rights (DIHR)

64. The Secretariat of the African Commission still receives extra budgetary funding from the Danish Institute for Human Rights (formerly the Danish Centre for Human Rights) to finance the post of Technical Assistant.

b) Swedish International Development Agency (SIDA)

65. SIDA still funds the Commission's promotional and protection activities. This grant is designated for the African Commission's activities and for strengthening the Secretariat's Staff capacity.

c) The Government of The Netherlands

66. The Ministry of Foreign Affairs of the Netherlands continues to support the Documentation Centre, the Public Relations Section and two positions of Legal Officers.

d) Droits et Démocratie

67. Droits et Démocratie has given the African Commission a grant of fifty two thousand, five hundred and twenty one Canadian dollars and fifty cents (52,521.50) for specific activities, namely -:

- The campaign to ratify the Protocol to the African Charter on Human and Peoples' Rights for the Establishment of an African Court on Human and Peoples' Rights;
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and
- The Meeting on democracy and elections in Africa.

68. The African Commission expresses its profound gratitude to all the donors and other partners whose financial, material and other contributions have enabled it to carry out its mandate during the period under review.

K. Adoption of the 17th Annual Activity Report by the Assembly of Heads of State and Government of the African Union

69. The Assembly of Heads of State and Government of the African Union, after due consideration, adopted the 17th Annual Activity Report by a decision in which it expressed its satisfaction with the Report and authorised its publication.

LIST OF ANNEXES

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Annex I

*Status of Submission of Initial & State Periodic
Reports to the African Commission on
Human and Peoples' Rights
(As at May 2004)*

Annex II

Executive Summary of the Report of the Fact-finding Mission to Zimbabwe⁵ 24th to 28th June 2002

⁵ A complete report of the Fact-Finding Mission to Zimbabwe can be obtained from the Secretariat of the African Commission on Human and Peoples' Rights.

INTRODUCTION

Following widespread reports of human rights violations in Zimbabwe, the African Commission on Human and Peoples' Rights (African Commission) at its 29th Ordinary Session held in Tripoli from **23rd April to 7th May 2001** decided to undertake a fact-finding mission to the Republic of Zimbabwe from **24th to 28th June 2002**.

The stated purpose of the Mission was to gather information on the state of human rights in Zimbabwe. In order to do so, the Mission sought to meet with representatives of the Government of the Republic of Zimbabwe, law-enforcement agencies, the judiciary, political parties and with organised civil society organisations especially those engaged in human rights advocacy. The method of the fact-finding team was to listen and observe the situation in the country from various angles, listen to statements and testimony of the many actors in the country and conduct dialogue with government and other public agencies.

FINDINGS

1. The Mission observed that Zimbabwean society is highly polarised. It is a divided society with deeply entrenched positions. The land question is not in itself the cause of division. It appears that at heart is a society in search of the means for change and divided about how best to achieve change after two decades of dominance by a political party that carried the hopes and aspirations of the people of Zimbabwe through the liberation struggle into independence.
2. There is no doubt that from the perspective of the fact-finding team, the land question is critical and that Zimbabweans, sooner or later, needed to address it. The team has consistently maintained that from a human rights perspective, land reform has to be the prerogative of the government of Zimbabwe. The Mission noted that Article 14 of the African Charter states "*The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*". It appears to the Mission that the Government of Zimbabwe has managed to bring this policy matter under the legal and constitutional system of the country. It now means that land reform and land distribution can now take place in a lawful and orderly fashion.
3. There was enough evidence placed before the Mission to suggest that, at the very least during the period under review, human rights violations occurred in Zimbabwe. The Mission was presented with testimony from witnesses who were victims of political violence and others victims of torture while in police custody. There was evidence that the system of arbitrary arrests took place. Especially alarming was the arrest of the President of the Law Society of Zimbabwe and journalists including Peta Thorncroft, Geoffrey Nyarota, among many others, the arrests and torture of opposition members of parliament and human rights lawyers like Gabriel Shumba.
4. There were allegations that the human rights violations that occurred were in many instances at the hands of ZANU PF party activists. The Mission is however not able to find definitively that this was part of an orchestrated policy of the government of the Republic of Zimbabwe. There were enough assurances from the Head of State, Cabinet Ministers and the leadership of the ruling party that there has never been any plan or policy of violence, disruption or any form of human rights violations, orchestrated by the State. There was also an acknowledgement that excesses did occur.

5. The Mission is prepared and able to rule, that the Government cannot wash its hands from responsibility for all these happenings. It is evident that a highly charged atmosphere has been prevailing, many land activists undertook their illegal actions in the expectation that government was understanding and that police would not act against them – many of them, the War Veterans, purported to act as party veterans and activists. Some of the political leaders denounced the opposition activists and expressed understanding for some of the actions of ZANU (PF) loyalists. Government did not act soon enough and firmly enough against those guilty of gross criminal acts. By its statements and political rhetoric, and by its failure at critical moments to uphold the rule of law, the government failed to chart a path that signalled a commitment to the rule of law.
6. There has been a flurry of new legislation and the revival of the old laws used under the Smith Rhodesian regime to control, manipulate public opinion and that limited civil liberties. Among these, the Mission's attention was drawn to the Public Order and Security Act, 2002 and the Access to Information and Protection of Privacy Act, 2002. These have been used to require registration of journalists and for prosecution of journalists for publishing "false information". All these, of course, would have a "chilling effect" on freedom of expression and introduce a cloud of fear in media circles. The Private Voluntary Organisations Act has been revived to legislate for the registration of NGOs and for the disclosure of their activities and funding sources.
7. There is no institution in Zimbabwe, except the Office of the Attorney General, entrusted with the responsibility of oversight over unlawful actions of the police, or to receive complaints against the police. The Office of the Ombudsman is an independent institution whose mandate was recently extended to include human rights protection and promotion. It was evident to the Mission that the office was inadequately provided for such a task and that the prevailing mindset especially of the Ombudsman herself was not one which engendered the confidence of the public. The Office was only about the time we visited, publishing an annual report five years after it was due. The Ombudsman claimed that her office had not received any reports of human rights violations. That did not surprise the Mission seeing that in her press statement following our visit, and without undertaking any investigations into allegations levelled against them, the Ombudsman was defensive of allegations against the youth militia. If the Office of the Ombudsman is to serve effectively as an office that carries the trust of the public, it will have to be independent and the Ombudsman will have to earn the trust of the public. Its mandate will have to be extended, its independence guaranteed and accountability structures clarified.
8. The Mission was privileged to meet with the Chief Justice and the President of the High Court. The Mission Team also met with the Attorney General and Senior Officers in his office. The Mission was struck by the observation that the judiciary had been tainted and even under the new dispensation bears the distrust that comes from the prevailing political conditions. The Mission was pleased to note that the Chief Justice was conscious of the responsibility to rebuild public trust. In that regard, he advised that a code of conduct for the judiciary was under consideration. The Office of the Attorney General has an important role to play in the defence and protection of human rights. In order to discharge that task effectively, the Office of the Attorney General must be able to enforce its orders and that the orders of the courts must be obeyed by the police and ultimately that the professional judgement of the Attorney General must be respected.

9. The Mission noted with appreciation the dynamic and diverse civil society formations in Zimbabwe. Civil society is very engaged in the developmental issues in society and enjoys a critical relationship with government. The Mission sincerely believes that civil society is essential for the upholding of a responsible society and for holding government accountable. A healthy though critical relationship between government and civil society is essential for good governance and democracy.

RECOMMENDATIONS

In the light of the above findings, the African Commission offers the following recommendations -:

On National Dialogue and Reconciliation

Further to the observations about the breakdown in trust between government and some civil society organisations especially those engaged in human rights advocacy, and noting the fact that Zimbabwe is a divided society, and noting further, however, that there is insignificant fundamental policy difference in relation to issues like land and national identity, Zimbabwe needs assistance to withdraw from the precipice. The country is in need of mediators and reconcilers who are dedicated to promoting dialogue and better understanding. Religious organisations are best placed to serve this function and the media needs to be freed from the shackles of control to voice opinions and reflect societal beliefs freely.

Creating an Environment Conducive to Democracy and Human Rights

The African Commission believes that as a mark of goodwill, government should abide by the judgements of the Supreme Court and repeal sections of the Access to Information Act calculated to freeze the free expression of public opinion. The Public Order Act must also be reviewed. Legislation that inhibits public participation by NGOs in public education, human rights counselling must be reviewed. The Private Voluntary Organisations Act should be repealed.

Independent National Institutions

Government is urged to establish independent and credible national institutions that monitor and prevent human rights violations, corruptions and maladministration. The Office of the Ombudsman should be reviewed and legislation which accords it the powers envisaged by the Paris Principles adopted. An independent office to receive and investigate complaints against the police should be considered unless the Ombudsman is given additional powers to investigate complaints against the police. Also important is an Independent Electoral Commission. Suspicions are rife that the Electoral Supervisory Commission has been severely compromised. Legislation granting it greater autonomy would add to its prestige and generate public confidence.

The Independence of the Judiciary

The judiciary has been under pressure in recent times. It appears that their conditions of service do not protect them from political pressure; appointments to the bench could be done in such a way that they could be insulated from the stigma of political patronage. Security at Magistrates' and High Court should ensure the protection of presiding officers. The independence of the judiciary should be assured in practice and judicial orders must be obeyed. Government and the media have a responsibility to ensure the high regard and esteem due to members of the judiciary by refraining from political

attacks or the use of inciting language against judges and magistrates. A Code of Conduct for Judges could be adopted and administered by the judges themselves. The African Commission commends to the Government of the Republic of Zimbabwe for serious consideration and application of the *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa* adopted by the African Commission at its 33rd Ordinary Session in Niamey, Niger in May 2003.

A Professional Police Service

Every effort must be made to avoid any further politicisation of the police service. The police service must attract all Zimbabweans from whatever political persuasion or none to give service to the country with pride. The police should never be at the service of any political party but must at all times seek to abide by the values of the Constitution and enforce the law without any fear or favour. Recruitment to the service, conditions of service and in-service training must ensure the highest standards of professionalism in the service. Equally, there should be an independent mechanism for receiving complaints about police conduct. Activities of units within the ZRP like the law and order unit which seems to operate under political instructions and without accountability to the ZRP command structures should be disbanded. There were also reports that elements of the CIO were engaged in activities contrary to international practice of intelligence organisations. These should be brought under control. The activities of the youth militia trained in the youth camps have been brought to our attention. Reports suggest that these youth serve as party militia engaged in political violence. The African Commission proposes that these youth camps be closed down and training centres be established under the ordinary education and employment system of the country. The African Commission commends for study and implementation the *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (otherwise known as The Robben Island Guidelines) adopted by the African Commission at its 32nd Ordinary Session held in Banjul, The Gambia in October 2002.

The Media

A robust and critical media is essential for democracy. The government has expressed outrage at some unethical practices by journalists, and the Access to Information Act was passed in order to deal with some of these practices. The Media and Ethics Commission that has been established could do a great deal to advance journalistic practices, and assist with the professionalisation of media practitioners. The Media and Ethics Commission suffers from the mistrust on the part of those with whom it is intended to work. The Zimbabwe Union of Journalists could have a consultative status in the Media and Ethics Commission. Efforts should be made to create a climate conducive to freedom of expression in Zimbabwe. The POSA and Access to Information Act should be amended to meet international standards for freedom of expression. Any legislation that requires registration of journalists, or any mechanism that regulates access to broadcast media by an authority that is not independent and accountable to the public, creates a system of control and political patronage. The African Commission commends the consideration and application of the *Declaration on the Principles on Freedom of Expression in Africa* adopted by the 32nd Ordinary Session of the African Commission in Banjul, October 2002.

Reporting Obligations to the African Commission

The African Commission notes that the Republic of Zimbabwe now has three overdue reports in order to fulfil its obligations in terms of Article 62 of the African Charter. Article 1 of the African Charter states that State Parties to the Charter shall “recognise the rights, duties and freedoms enshrined in the Charter and *shall undertake to adopt*

legislative or other measures to give effect to them.” Article 62 of the African Charter provides that each State Party shall undertake to submit every two years “a report on the legislative or other measures taken, with a view to giving effect to the rights and freedoms recognised and guaranteed by the present Charter.” The African Commission therefore reminds the Government of the Republic of Zimbabwe of this obligation and urges the government to take urgent steps to meet its reporting obligations. More pertinently, the African Commission hereby invites the Government of the Republic of Zimbabwe to report on the extent to which these recommendations have been considered and implemented.

Annex III

Distribution of State Parties among Members of the African Commission

**DISTRIBUTION OF COUNTRIES AMONG COMMISSIONERS
FOR THEIR PROMOTION ACTIVITIES**

- | | |
|-----------------------------------|--|
| 1. H.E. Amb. Salamata Sawadogo | Burundi, Gabon, Ethiopia, Niger and Republic of Congo (Brazzaville) |
| 2. Mr. Yaser El Hassan | Mauritania, Somalia, Djibouti, Libya, Chad and Egypt |
| 3. H.E. Amb. Kamel Rezag Bara | Algeria, Saharawi Arab Democratic Republic, Central African Republic, Comoros and Madagascar |
| 4. Mrs. Jainaba Johm | Nigeria, Togo, Senegal, Gambia, Benin and Tunisia |
| 5. Prof. Emmanuel E.V.O. Dankwa | The Ghana, Sierra Leone, Liberia and Guinea Bissau |
| 6. Mr. Andrew Ranganayi Chigovera | South Africa, Namibia, Zambia and Democratic Republic of Congo |
| 7. Dr. Vera Mlangazuwa Chirwa | Swaziland, Kenya, Tanzania and Uganda |
| 8. Dr. Angela Melo | Angola, Sao Tome & Principe, Cape Verde, Equatorial Guinea and Cameroon |
| 9. Mr. Mohamed A. Ould Babana | Côte d'Ivoire, Burkina Faso, Guinea, Mali Rwanda and Sudan |
| 10. Ms. Sanji M. Monageng | Mauritius, Zimbabwe, Mozambique and Lesotho |
| 11. M. Bahame Tom M. Nyanduga | Malawi, Eritrea, Seychelles and Botswana |

Annex IV

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

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

1. Joint mechanism for implementation:

- Establish a focal person in each institution:
 - One Member of the African Commission to be appointed as focal person.
 - If possible, have a Committee composed of 2 additional Commissioners with the focal Commissioner designated as Chair, and with the assistance of a Legal Officer
 - Focal persons to be designated within UNHCR (Africa Bureau and RLO Addis)
- The African Commission should request the Commission of the African Union to invite it to become a Member of the Coordinating Committee on Assistance to Refugees.
- In carrying out these activities, the African Commission and UNHCR should involve as much as possible the Division of Humanitarian Affairs, Refugees and Displaced Persons of the Commission of the African Union.

2. Areas of interaction:

2.1 Submission of Communications to ACHPR

In furtherance of paragraphs 1 and 4 of Article II of the Memorandum of Understanding, the African Commission will encourage NGOs and other partners to submit communications on violations of the rights of refugees, returnees, asylum seekers and other persons of concern to UNHCR. The African Commission will ensure that this does not compromise the confidential character of communications.

2.2 Missions

- In the context of the African Commission's promotional missions, ensure that refugee rights are an integral part of the terms of reference;
- Where feasible, joint seminars to be organized during the course of such promotional missions, for the benefit of refugees, IDPs, government officials, NGOs and other concerned actors;
- Joint field missions to be undertaken comprising Members of the African Commission, members of the African Union's Commission on Refugees and UNHCR;
- The African Commission to ensure that at least one promotional mission in each year coincides with the commemoration of World Refugee Day, during which emphasis will be on the promotion of refugee rights;

2.3. *Periodic Reports of States Parties*

- The African Commission to request States Parties to ensure that information on the implementation of refugee rights form an integral part of their periodic reports;
- The African Commission will inform the UNHCR of reports of States Parties scheduled to be considered at the African Commission's ordinary sessions; and request the UNHCR to provide information on refugees, returnees, asylum seekers and IDPs in order to better inform the process of consideration of State reports by the African Commission;

2.4. *Sessions of the African Commission*

- An agenda item on refugees to be a standing item on the agenda of each ordinary session of the African Commission;
- UNHCR to provide the African Commission with information on areas of concern to better inform the discussion of this agenda item;
- Annual activity report of the Commission to the Assembly of Heads of State and Government to include report on the status of implementation of refugee rights in Africa;

2.5. *Monitoring Implementation*

- Bi-annual meetings between African Commission and UNHCR to review status of implementation of the Memorandum of Understanding and to determine further areas of co-operation, as deemed appropriate.

Annex IV

Resolutions Adopted During The 34th and 35th Ordinary Sessions

- *Resolution on the adoption of the Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities;*
- *Resolution on the Renewal of the Term of the Special Rapporteur on the Rights of Women in Africa*
- *Resolution on the Adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa*
- *Resolution on the Protection of Human Rights Defenders in Africa*
- *Resolution on the situation of human rights in Cote D'Ivoire*
- *Resolution on the situation of human rights in Darfur, Sudan*
- *Resolution on the situation of human rights in Nigeria*
- *Resolution on the Situation of Women and Children in Africa*

**RESOLUTION ON THE ADOPTION OF THE
“REPORT OF THE AFRICAN COMMISSION’S WORKING GROUP ON
INDIGENOUS POPULATIONS/COMMUNITIES”**

The African Commission on Human and Peoples’ Rights, meeting at its 34th Ordinary Session, in Banjul, The Gambia from 6th to 20th November 2003;

Recalling the provisions of the African Charter on Human and Peoples’ Rights which entrusts it with a treaty monitoring function and the mandate to promote human and peoples rights and ensure their protection in Africa;

Conscious of the situation of vulnerability in which indigenous populations/communities in Africa frequently find themselves and that in various situations they are unable to enjoy their inalienable human rights;

Recognising the standards in International law for the promotion and protection of the rights of minorities and indigenous peoples, including as articulated in the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, the International Labour Convention 169 on Indigenous and Tribal Peoples in Independent Countries, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child;

Considering the emphasis given in International law to self identification as the primary criterion for the determination of who constitutes a minority or indigenous person; and the importance of effective and meaningful participation and of non discrimination, including with regard to the right to education;

Considering that the African Commission at its 28th Ordinary Session held in Cotonou, Benin in October 2000, adopted the “*Resolution on the Rights of Indigenous Populations/Communities*” which provided for the establishment of a Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa with the mandate to:

- Examine the concept of indigenous populations/communities in Africa;
- Study the implications of the African Charter on Human and Peoples Rights on the well being of indigenous communities;
- Consider appropriate recommendations for the monitoring and protection of the rights of indigenous populations/communities.

Noting that a Working Group of Experts comprised of three Members of the African Commission, three Experts from indigenous communities in Africa and one Independent Expert was established by the African Commission at its 29th Ordinary Session held in Tripoli, Libya in May 2001 and consequently held its first meeting prior to the 30th Ordinary Session held in Banjul, the Gambia in October 2001 where it agreed on developing a *Conceptual Framework Paper* as a basis for the elaboration of a final report to the African Commission, and where it agreed on a work-plan;

Noting further that the Working Group of Experts convened a Roundtable Meeting prior to the 31st Ordinary Session of the African Commission in April 2002 in Pretoria, South Africa where it discussed the first draft of the *Conceptual Framework Paper* with African human rights experts whose contributions were taken into account in the elaboration of the second draft of the *Conceptual Framework Paper* which was further discussed at a Consultative Meeting held in January 2003, in Nairobi, Kenya;

Emphasising that the Final Report of the Working Group of Experts is the outcome of a thorough consultative process involving various stakeholders on matters relating to indigenous populations/communities in Africa;

Reaffirming the need to promote and protect more effectively the human rights of indigenous populations/communities in Africa;

Taking into account the absence of a mechanism within the African Commission with a specific mandate to monitor, protect and promote the respect and enjoyment of the human rights of indigenous populations/communities in Africa;

Decides to:

Adopt the “*Report of the African Commission’s Working Group on Indigenous Populations/Communities*”, including its recommendations

Publish as soon as possible and in collaboration with International Working Group of Indigenous Affairs (IWGIA) the report of the Working Group of Experts and ensure its wide distribution to Member States and policy makers in the international development arena;

Maintain on the agenda of its ordinary sessions the item on the situation of indigenous populations/communities in Africa

Establish a Working Group of Experts for an initial term of 2 years comprising of -:

1. Commissioner Andrew Ranganayi Chigovera (Chair)
2. Commissioner Kamel Rezag Bara,
3. Marianne Jensen (Independent Expert)
4. Naomi Kipuri
5. Mohammed Khattali
6. Zephyrin Kalimba

for the promotion and protection of the rights of indigenous populations/communities in Africa and with the following Terms of Reference;

- With support and cooperation from interested Donors, Institutions and NGOs, raise funds for the Working Group’s activities relating to the promotion and protection of the rights of indigenous populations/communities in Africa;
- Gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous populations and their communities and organisations, on violations of their human rights and fundamental freedoms;
- Undertake country visits to study the human rights situation of indigenous populations/communities;
- Formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities;
- Submit an activity report at every ordinary session of the African Commission;
- Co-operate when relevant and feasible with other international and regional human rights mechanisms, institutions and organisations.

Done in Banjul, The Gambia, 20th November 2003

**RESOLUTION ON THE RENEWAL OF THE MANDATE
OF THE TERM OF THE SPECIAL RAPPORTEUR
ON THE RIGHTS OF WOMEN IN AFRICA**

The African Commission on Human and Peoples' Rights at its 34th Ordinary Session that took place from 6th to 20th November 2003 in Banjul, The Gambia,

Recalling the resolution it adopted at its 25th Ordinary Session that took place from 26th April to 5th May 1999 in Bujumbura, Burundi, in which it appointed a Special Rapporteur on the Rights of Women in Africa;

Recalling further the provisions of Article 18(3) of the African Charter on Human and Peoples' Rights;

Referring further the provisions of Article 45(1)(a) of the African Charter on Human and Peoples' Rights;

Recalling its decision taken at the 30th Ordinary Session, in October 2001 in Banjul, the Gambia, nominating Commissioner Angela Melo as the Special Rapporteur on the Rights of Women in Africa;

Considering the necessity to allow the Special Rapporteur to continue to carry out her mandate;

Decides to renew the mandate of Angela Melo as Special Rapporteur on the Rights of Women in Africa for a period of one (1) year;

Requests the Secretariat of the African Commission to enhance its efforts to mobilise resources that could assist the Special Rapporteur to carry out her mandate.

Done in Banjul, The Gambia, 20th November 2003

**RESOLUTION ON THE ADOPTION OF THE “OUAGADOUGOU
DECLARATION AND PLAN OF ACTION ON ACCELERATING PRISON
AND PENAL REFORM IN AFRICA”**

The African Commission on Human and Peoples’ Rights meeting at its 34th Ordinary Session held in Banjul, The Gambia from 6 - 20 November 2003;

Recalling Article 30 of the African Charter on Human and Peoples’ Rights which mandates it to promote and protect human and peoples’ rights and to ensure their protection in Africa;

Recalling its resolution on prisons in Africa adopted by the African Commission at its 17th Ordinary Session held in Lome, Togo in 1995;

Recalling further the appointment of the Special Rapporteur on Prisons and Conditions of Detention in Africa at its 20th Ordinary Session held in Grand Bay, Mauritius in 1996;

Considering the adoption of the Kampala Declaration on Prison Conditions in Africa in 1996 and the progress made in raising general prison standards in Africa since then;

Bearing in mind the various international instruments relating to the promotion of the rights of persons deprived of their liberty in general and penal reform in particular;

Reaffirming the necessity to promote and protect the rights of persons deprived of their liberty through penal reform;

Adopts the “Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa”.

Decides to publish as soon as possible the “Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa” and ensure its wide distribution to Member States of the African Union, Civil Society Organisations and decision makers in the field of penal reform and the administration of justice;

Request the Special Rapporteur on Prisons and Conditions of Detention in Africa to report on the implementation of this resolution at its 35th Ordinary Session.

Done in Banjul, The Gambia, 20th November 2003

RESOLUTION ON THE PROTECTION OF HUMAN RIGHTS DEFENDERS IN AFRICA

The African Commission on Human and Peoples' Rights meeting at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia;

Recognising the crucial contribution of the work of human rights defenders in promoting human rights, democracy and the rule of law in Africa;

Seriously concerned about the persistence of violations targeting individuals and members of their families, groups or organisations working to promote and protect human and peoples' rights and by the growing risks faced by human rights defenders in Africa;

Noting with deep concern that impunity for threats, attacks and acts of intimidation against human rights defenders persists and that this impacts negatively on the work and safety of human rights defenders;

Recalling that it is entrusted by the African Charter on Human and Peoples' Rights with the mandate to promote human and peoples' rights and ensure their protection in Africa;

Reaffirming the importance of the observance of the purposes and principles of the African Charter for the promotion and protection of all human rights and fundamental freedoms for human rights defenders and all persons on the continent;

Bearing in mind the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders);

Mindful that in the Grand Bay (Mauritius) Declaration, the Organisation of African Unity called on Member States "to take appropriate steps to implement the UN Declaration on Human Rights Defenders in Africa";

Mindful that the Kigali Declaration recognises "the important role that the human rights defenders play in the promotion and protection of human rights in Africa"

Recalling its decision to include on its agenda the situation of human rights defenders and to nominate a Special Rapporteur on human rights defenders;

1. ***Now decides to appoint*** a Special Rapporteur on Human Rights Defenders in Africa for a period of two years with the following mandate -:
 - a. To seek, receive, examine and to act upon information on the situation of human rights defenders in Africa;
 - b. To submit reports at every ordinary session of the African Commission on the situation of human rights defenders in Africa;
 - c. To cooperate and engage in dialogue with Member States, National Human Rights Institutions, relevant intergovernmental bodies, international and regional mechanisms of protection of human rights defenders, human rights defenders and other stake holders;

- d. To develop and recommend effective strategies to better protect human rights defenders and to follow up on his/her recommendations;
 - e. To raise awareness and promote the implementation of the UN Declaration on Human Rights Defenders in Africa
2. **Further decides** to nominate Commissioner Jainaba Johm as Special Rapporteur on Human Rights Defenders in Africa for the current duration of her mandate within the African Commission;
 3. **Reiterates** its support for the work carried out by human rights defenders in Africa;
 4. **Calls upon** Member States to promote and give full effect to the UN Declaration on Human Rights Defenders, to take all necessary measures to ensure the protection of human rights defenders and to include information on measures taken to protect human rights defenders in their periodic reports;
 5. **Invites** its members to mainstream the issue of human rights defenders in their activities;
 6. **Urges** Member States to co-operate with and assist the Special Rapporteur in the performance of his/her tasks and to provide all necessary information for the fulfilment of his/her mandate;
 7. **Requests** the African Union to provide adequate resources, assistance and support in the implementation of this Resolution.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS IN COTE D'IVOIRE

The African Commission on Human and Peoples' Rights at its 35th Ordinary Session held in Banjul from 21st May to 4th June 2004, in Banjul, The Gambia;

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights (African Charter), and other regional and international human rights and international humanitarian law treaties, to which the Republic of Cote d'Ivoire is a party;

Deploring the events of 24th to 26th March 2004, which were marked by shootings, wounding and massacres of innocent civilians;

Welcoming with appreciation the Government's statement that a Commission of enquiry will be set up;

Considering the findings of the Commission of Inquiry of the Office of the United Nations High Commission for Human rights which found the Government authorities responsible for the March 2004 gross human rights violations;

Considering the grave concerns expressed on 27 May 2004, by the Peace and Security Council of the African Union, at the situation prevailing in Cote d'Ivoire and its repercussions on peace and security, stability for the country and for the entire sub-region;

Deeply concerned over the deadlock in the implementation of the Linas-Marcoussis Agreement and the continuing deterioration of the situation in Côte d'Ivoire and the impunity enjoyed by perpetrators of gross human rights violations against civilians since 1999;

Recalling the missions carried out by the African Commission from 2nd to 4th April 2001 and from 24th to 26th April 2003;

Considering the initiative of the United Nations High Commission for Human Rights to set up a Commissioner to investigate the human rights violations perpetrated since the beginning of the crisis in Côte d'Ivoire;

Noting the laudable role of ECOWAS in its efforts to bring peace to Côte d'Ivoire and the efforts of the President of the African Union Commission to facilitate an effective re-launch of the peace process in Côte d'Ivoire and, more particularly, to contribute to the promotion of dialogue and understanding among the leaders of the countries of the region;

1. **Deplores** the grave and rampant human rights violations committed against the civilian populations, such as summary and arbitrary executions, torture and arbitrary detention and disappearances;
2. **Requests** the President of the Republic of Cote d'Ivoire, National Reconciliation Government and all Ivorian political parties to implement the Linas-Marcoussis agreement;

3. ***Urges*** the Ivorian authorities to spare no efforts in ensuring that the perpetrators of the violation of human rights during the period of 24th to 26th March 2004 and any other violations perpetrated are brought to justice and the victims and their families appropriately compensated;
4. ***Calls upon*** the Ivorian Government to ensure full compliance with the provisions of the African Charter on Human & Peoples' Rights and other international human rights instruments.
5. ***Undertakes*** to send a fact-finding mission to investigate human rights violations committed in Cote d'Ivoire since the beginning of the crisis.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS IN DARFUR, SUDAN

The African Commission on Human and Peoples' Rights at its 35th Ordinary Session held in Banjul from 21st May to 4th June 2004, in Banjul, The Gambia

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights (African Charter), and other regional and international human rights and international humanitarian treaties, to which the Sudan is a party;

Mindful that, Sudan, as a State Party to the aforementioned instruments, is legally bound to fully and effectively implement the provisions of these instruments and respect the human rights and fundamental freedoms set therein without discrimination on any grounds;

Recalling the report of the UN High Commissioner for Human Rights, Situation of Human Rights in the Darfur region of the Sudan, 7th May 2004;

Deeply concerned over the prevailing situation in Darfur, particularly the continuing humanitarian crisis and the reported human rights violations committed in that region since the beginning of the crisis such as the mass killings, sexual violence as a means of warfare and the abduction of women and children;

Alarmed by the large number of internally displaced persons and the continuing exodus of refugees mainly from Darfur;

Recalling the Resolution on Sudan adopted by the African Commission on Human and Peoples' Rights at its 17th Ordinary session in Lome, Togo;

Recalling the decision on the crisis in the Darfur region of Sudan, adopted by the Peace and Security Council of the African Union on the 25th May 2004, urging the Parties to fully and scrupulously implement the Humanitarian Ceasefire Agreement signed on 8 April 2004, in N'djamena, Chad, between the Government of Sudan (GoS), the Sudan Liberation Movement/Army (SLM/A), and the Justice and Equality Movement (JEM);

Mindful of the mandate of the African Commission in terms of the Charter to "promote human and peoples' rights and ensure their protection in Africa" and especially in a situation of serious or massive violation of human and peoples' rights (Article 58 (1));

1. **Deplores** the ongoing gross human rights violations in the Darfur region of Sudan;
2. **Calls upon** all parties to the armed conflict to immediately cease using military force to interfere with the delivery of humanitarian assistance to the civilian population and to allow such assistance to be delivered unhindered;
3. **Welcomes** the announcement by the Sudanese authorities of their decision to allow and facilitate access of humanitarian agencies and organizations and the deployment of observers from the African Union and the international community to Darfur, as well as to facilitate the return of IDPs and refugees;

4. ***Further welcomes*** the announcement by the Sudanese Government of their decision to allow and facilitate access of a fact-finding mission of the African Commission;
5. ***Accepts*** to send a fact-finding mission to Darfur to investigate reports on human rights violations in Darfur and to report back to it.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF HUMAN RIGHTS IN NIGERIA

The African Commission on Human and Peoples Rights at its 35th Ordinary Session held from 21st May to 4th June 2004, in Banjul, The Gambia.

Considering the provisions of the Constitutive Act of the African Union, the Charter of the United Nations, as well as those of the African Charter on Human and Peoples' Rights and other regional and international human rights and international humanitarian law treaties to which the Republic of Nigeria is a party;

Deeply concerned over the prevailing situation in the Northern States of Nigeria, particularly the recent ethnic and religious violence in Yelwa, Plateau State and Kano State respectively in May 2004;

Alarmed by the large number of internally displaced persons and enormous loss of life as a result of the recent ethnic and religious violence;

Recalling the declarations of the United Nations Secretary-General on May 10, 2004 urging the Nigerian Government to ensure the security of individuals and property and to promote reconciliation in conformity with the principles of the rule of law;

Mindful of the mandate of the African Commission in terms of the Charter to promote and protect human and peoples rights

1. **Deplores** the grave and rampant human rights violations committed against the civilian populations in the Northern part of Nigeria
2. **Urges** the Nigerian Government to bring the perpetrators of any human rights violation to justice, and to compensate victims and their families;
3. **Calls upon** the Nigerian Government to ensure full compliance with the provisions of the African Charter on Human and Peoples Rights and other international human rights instruments;
4. **Decides** to send a fact-finding mission to investigate all human rights violations committed in the northern part of Nigeria.

Done in Banjul, The Gambia, 4th June 2004

RESOLUTION ON THE SITUATION OF WOMEN AND CHILDREN IN AFRICA

The African Commission on Human and Peoples' Rights during its 35th ordinary session held from 21st May to 4th June 2004 in Banjul, The Gambia,

Considering the provisions of the UN Convention on the elimination of all Forms of Discrimination Against Women and other regional and international human rights treaties relating to the rights of women;

Recalling that the Assembly of Heads of State and Government of the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa at its 2nd Ordinary Session held in July 2003 in Maputo, Mozambique;

Noting that the African Charter on the Rights and Welfare of the Child entered into force on 29th November 1989;

Noting further that the 11 Members of the African Committee of Experts on the Rights and Welfare of the Child were elected by OAU Member States at the 37th Ordinary Session of the OAU Assembly of Heads of States and Governments held in Lusaka, Zambia in July 2001;

Considering that the situation of the women and children in Africa needs to be thoroughly addressed;

Considering that women and children are victims of multiple human rights violations;

Considering deportation, slavery, child trafficking and the proliferation of street children in some countries of our continent;

Considering the persistence of traditional practices that are harmful to women and children in some African countries ("talibes" children and genital mutilation);

Concerned about widespread poverty among women and the stigmatization of women and children with HIV/AIDS;

1. **Urges** member states of the African Union to ratify the Protocol to the African Charter on the Rights of Women in Africa in order to facilitate its entry into force;
2. **Urges** all AU member states to ratify the United Nations Convention against All Forms of Discrimination against Women, and member states that have ratified it with reservations to withdraw them;
3. **Launches** an appeal to Member States to incorporate the above-mentioned international instrument into their national laws;
4. **Urges** member states to set up a special protection mechanism for women and children in war zones;

5. **Appeals** to member states to disarm and demobilize child soldiers, and put in place a system for their social reintegration;
6. **Appeals** to Member States to implement programmes to fight against HIV/AIDS;
7. **Appeals** to Member States to devise a system to help women benefit from social security.

Done in Banjul, The Gambia, 4th June 2004

Annex VII

Decisions On Communications Brought Before The African Commission

Decisions adopted at the 34th and 35th Ordinary Session of the African Commission

Decisions on the Merits

1. Communication 157/1996 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia
2. Communication 197/1997 – Bah Ould Rabah/Mauritania
3. Communication 199/97 – Odjouoriby Cossi Paul/Benin
4. Communication 240/2001 – Interights et al (on behalf of Mariette Sonjaleen Bosch)/Botswana
5. Communication 242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme*/Mauritania
6. Communication 250/2002 – Liesbeth Zegveld and Mussie Ephrem/Eritrea

Communications declared inadmissible

1. Communication 248/2002 – Interights and OMCT/Nigeria
2. Communication 256/2002 – Samuel Kofi Woods, II and Kabineh M. Ja'neh/Liberia
3. Communication 258/2002 – Miss A/Cameroon

Communication withdrawn by the Complainant

1. Communication 283/2003 – B/Kenya

*DECISIONS ON THE
MERITS*

157/96 - Association Pour la Sauvegarde de la Paix au Burundi /Tanzania, Kenya, Uganda, Rwanda, Zaire and Zambia

Rapporteur:

20th session: Commissioner Duarte

21st session: Commissioner Ondziel-Gnelenga

22nd session: Commissioner Ondziel-Gnelenga

23rd session: Commissioner Ondziel-Gnelenga

24th session: Commissioner Ondziel-Gnelenga

25th session: Commissioner Ondziel-Gnelenga

26th session: Commissioner Rezag Bara

27th session: Commissioner Rezag Bara

28th session: Commissioner Rezag Bara

29th Session: Commissioner Rezag Bara

30th session: Commissioner Rezag Bara

31st session: Commissioner Rezag Bara

32nd session: Commissioner Rezag Bara

33rd session: Commissioner Rezag Bara

Summary of Facts:

1. The communication was submitted by the *Association Pour la Sauvegarde de la Paix au Burundi* (ASP-Burundi, Association for the Preservation of Peace in Burundi), a non-governmental organisation based in Belgium. The communication pertains to the embargo imposed on Burundi by Tanzania, Kenya, Uganda, Rwanda, Zaire (now Democratic Republic of Congo), Ethiopia, and Zambia following the overthrow of the democratically elected government of Burundi and the installation of a government led by retired military ruler, Major Pierre Buyoya with the support of the military.
2. The Respondent states cited in the communication are all in the Great Lakes region, neighbouring Burundi and therefore have an interest in peace and stability in their region. At the Summit of the Great Lakes summit held in Arusha, Tanzania on 31 July 1996 following the unconstitutional change of government in Burundi, a resolution was adopted imposing an embargo on Burundi. The resolution was later supported by the United Nations Security Council and by the OAU. All except the Federal Republic of Ethiopia were, at the time of the submission of the communication, state parties to the African Charter on Human and Peoples' Rights. Ethiopia acceded to the African Charter on 17 June 1998.

The Complaint:

3. The Complainant claims that the embargo violates -:
 - Article 4 of the African Charter, because it prevented the importation of essential goods such as fuel required for purification of water and the preservation of drugs; and prevented the exportation of tea and coffee, which are the country's only sources of revenue;
 - Article 17 (1) of the African Charter, because the embargo prevented the importation of school materials;
 - Article 22 of the African Charter, because the embargo prevented Burundians from having access to means of transportation by air and sea;

- Article 23(2) (b) of the African Charter, because Tanzania, Zaire and Kenya sheltered and supported terrorist militia.
4. The communication also alleges violation of Articles 3(1), (2) and (3) of the OAU Charter, because the embargo constitutes interference in the internal affairs of Burundi.

Procedure:

5. The communication is dated 18th September 1996 and was received at the Secretariat on 30th September 1996.
6. At its 20th session, held in October 1996 in Grand Bay, Mauritius, the Commission decided to be seized of the communication.
7. On 10th December 1996, the Secretariat sent copies of the communication to the Ugandan, Kenyan, Tanzanian, Zambian, Zairian and Rwandan governments.
8. On 12th December 1996, a letter was sent to the Complainant indicating that the admissibility of the communication would be considered at the 21st session.
9. At its 21st session, held in April 1997, the Commission decided to be seized of the communication and deferred consideration of its admissibility to the following session. It also requested the Respondent States Parties to send in their comments within the stipulated deadline.
10. At its 22nd session, the Commission declared the communication admissible and asked the Secretariat to obtain clarification on the terms of the embargo imposed on Burundi from the Secretary General of the OAU. The Respondent States Parties were also, once again, requested to provide the Commission with their reactions, as well as their comments and arguments as regards the decision on merit.
11. On 18th November 1997, letters were addressed to the parties to inform them of the Commission's decision.
12. On 24th February 1998, the Secretariat of the Commission wrote to the OAU Secretary General requesting clarification on the terms of the embargo imposed on Burundi.
13. On 19th May 1998, the Secretariat received the Zambian government's reaction to the allegations made against it by the plaintiff. It claims that the sanctions imposed on Burundi ensued from a decision taken by Great Lakes countries in reaction to the coup d'état of 25 July 1996, which brought Major Pierre Buyoya to power, ousting the democratically elected government of President Ntibantuganya.
14. According to Zambia, the said sanctions were aimed at putting pressure on the regime of Major Buyoya with a view to causing it to restore constitutional legality, reinstate Parliament, which is the symbol of democracy, and lift the ban on political parties. It was also aimed at causing the regime to immediately and unconditionally initiate negotiations with all Burundian groups so as to re-establish peace and stability in the country, in accordance with the decisions of the Arusha regional Summit of 31 July 1996.

15. Regarding the allegation that Zambia violated resolution 2625(XXV), adopted on 24th October 1970 by the General Assembly of the United Nations, the Zambian government claims that the United Nations Security Council, in resolution n° 1072(1996), upheld the decision of the Arusha regional Summit to impose sanctions on Burundi.
16. Furthermore, Zambia states that it has derived no benefit of any sort from the embargo imposed on Burundi. On the contrary – the embargo had affected not only the inhabitants of Burundi, but also those of the States that imposed it. In Zambia for example, it continues, many workers at the Mpulungu port were sent on unpaid leave because there was no work, as a result of the embargo. The Zambian State thereby lost many billion Kwacha in revenue. This, according to the Zambian government, is the cost Zambia accepted to pay to contribute to the international effort to promote democracy, justice and the rule of law.
17. Regarding the allegation of violation by Zambia of Article 3(1), (2) and 3 of the Charter of the Organisation of African Unity on non-interference in the internal affairs of member States, the Zambian government recalls that the Organisation of African Unity, through its Secretariat, has held many meetings on the situation in Burundi. It concludes, therefrom that the decisions of the Arusha Regional Summit were endorsed by the Organisation of African Unity. Moreover, it points out that the sanctions imposed on Burundi were decided in consultation with the United Nations Organisation and the Organisation of African Unity.
18. As regards the allegation of violation by Zambia of the provisions of article 4 of the African Charter on Human and Peoples' Rights on the right to life and physical and moral integrity, Zambia points out that the sanctions monitoring committee had authorised the importation into Burundi, through United Nations agencies, of essential items such as infants' food, medical and pharmaceutical products for emergency treatment, among others. It concludes therefore that the embargo is far from being a total blockade.
19. To the allegation of violation of article 17 of the African Charter on Human and Peoples' Rights on the right to education, Zambia responds with the same arguments indicated above.
20. Zambia stresses that it is a democratic State. This, it states, is enshrined in article 1.1 of its Constitution, which states that the country "...is a sovereign, unitary, indivisible, multiparty democratic State". It thereby justifies what it refers to as its support for the ongoing democratisation process in Africa and claims to abhor regimes led by ethnic minorities. The Great Lakes countries in general and Zambia in particular, it continues, were right in imposing sanctions on Burundi to bring about the restoration of democracy and discourage coups d'état in Africa.
21. On 8th September 1998, the Secretariat received the reaction of the Tanzanian government on the communication under consideration. The latter rejected the allegations made against its country and ended with a plea for inadmissibility of the communication on the grounds among others that it contains several contradictions which were only aimed at defending the aggrieved state's interests. This country proceeded to argue its case as follows -:

22. "There is great confusion in the facts as presented by the Complainant; there are also many lies contained therein, particularly the accusation that Tanzania was preparing to send its army to Burundi at the request of the International Monetary Fund and the World Bank which had promised to fund the operation. The undeniable truth, and ASP-Burundi knows it well, is that the essential reason why Tanzania and the other countries in the region decided to impose sanctions is to bring about the negotiation of a lasting peace among all Burundian parties. The sanctions are used as a means of pressure, and the results are palpable, as in the restoration of the National Assembly, the lifting of the ban on political parties and the initiation of unconditional negotiations among all parties to the conflict. The discrete contacts with Mr. Léonard Nyangoma of CNDD are a step in the right direction envisaged in the imposition of the sanctions".
23. Regarding the allegation that Tanzania violated article 4 of the African Charter, citing the article, it stresses, "it is rather surprising to see ASP-Burundi using this article to support an allegation of human rights violations resulting from the sanctions. This association forgets or pretends to be unaware that the security situation in Burundi took a turn for the worse before and after the coup d'état and that it can be said emphatically that this provision of the Charter had been violated in a shameless way during this period. In June 1996, President S. Ntibantuganya and the then Prime Minister, Mr. Nduwayo, came to Arusha to solicit sub-regional assistance in the form of troops". Tanzania then goes on to enumerate some cases of violation of human rights by the Burundian government. It emphasises, inter alia, "that the war being waged against the Hutu militia by the Burundian army is conducted with ever increasing vigour, the massacre by the Burundian army of 126 refugees on their way back to their country from Tanzania, the establishment of concentration camps in Karugi, Mwamanya and Kayanza, camps that are populated by Hutus who are denied food even to the point of death, the detention of the Speaker of the National Assembly, Mr. Léons Ngandakumana...etc."
24. Reacting to the allegation of violation of article 17(1) of the Charter, Tanzania points out that "education and educational institutions were not the targets of the embargo; however, due to its multiplier effect, they were affected. In view of this, at the meeting held in Arusha on 6 April 1997, the leaders of the countries that had imposed the embargo decided to exclude educational materials on the list of items that are not subject to the embargo. This was with a view to alleviating the suffering of ordinary citizens".
25. Responding to the allegation of violation of article 22 of the Charter, Tanzania argues that it is "difficult to conceive that it is possible to enjoy economic and socio-cultural rights without enjoying the fundamental rights, which are the political rights that condition the others. The most fundamental and important rights, which deserve to be recognised and which are currently being trampled upon by the regime in power are political rights. The Great Lakes countries, other African countries and the international community at large would like to see an end to the cycle of violence in Burundi. This can only be achieved by way of a political settlement negotiated among the various Burundian factions".
26. Tanzania argues "the enjoyment of economic, cultural and social rights cannot be effective in the morass that Burundi has fallen into. Constitutional legality has first to be restored. That is the reinstatement of a democratically elected Parliament, the lifting

of the ban on political parties, and the beginning of political talks involving all parties to the conflict...”. In reaction to the allegation of violation of article 23,2 of the Charter, Tanzania states “it has never granted shelter to terrorists fighting against Burundi. However, Tanzania admits that it has always welcomed in its territory streams of refugees from Rwanda and Burundi each time trouble fares up in those two countries. Tanzania has always refused to serve as a rear base or staging post for any armed movement against its neighbours. Leaders of political parties and factions are welcomed in Tanzania just like other refugees are. But they are not allowed to carry out military activity against Burundi from Tanzanian territory”.

27. In response to the accusation that it violated the provisions of article III paragraphs 1,2 and 3 of the OAU Charter, Tanzania states that “it has not violated any of the principles enshrined in those texts”. It emphasises that “despite its [small] size, Burundi remains a sovereign State like any other African State. The sanctions imposed on it by its neighbouring countries do not undermine its sovereignty or its territorial integrity, nor much less its inalienable right to its own existence”. On the contrary, continues Tanzania, “the sanctions could play an important role in reminding the Burundian authorities of the content of the preamble to the OAU Charter, which states that all members of the OAU are conscious of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples. Another provision states that in order to create conditions for human progress, peace and security must be established and maintained. Peace and security are lacking in Burundi and the sanctions imposed on it could be one of the means of achieving them through dialogue”.
28. As regards the allegation of violation of article III paragraph 4 de of the OAU Charter, Tanzania comments “ASP-Burundi deliberately ignores one very important provision of the OAU Charter which states that OAU members solemnly affirm their adherence to the principle of the peaceful resolution of disputes by negotiation, mediation, conciliation and arbitration. The idea behind the imposition of the sanctions is precisely that of causing the application of this principle which a view to achieving lasting peace in Burundi. Contrary to ASP-Burundi’s contention that a dangerous precedent had been set, Tanzania believes that the countries of the Great Lakes region had set a favourable precedent. In the pursuit of the goals and objectives of the OAU, article II paragraph 2(2) states “to these ends, the member States shall cooperate and harmonise their general policies in the political and diplomatic fields” Tanzania concludes its exposition with a response to ASP-Burundi’s accusation that it had violated certain texts adopted by the United Nations, including some provisions of the Organisation’s Charter. It emphasises in particular that “the concept of regional arrangement adopted by the Great Lakes countries is straight out of chapter VIII of the United Nations Charter: “article 52 of the said Charter stipulates that regional arrangements may be used for keeping international peace and security, with the proviso that such actions shall be consistent with the goals and principles of the United Nations. This provision allows for regional arrangements to be used for peaceful settlements before having recourse to the Security Council. And indeed, the Council encourages regional arrangements”.
29. “Tanzania does not believe that the imposition of sanctions is an interference in the internal affairs of Burundi. Tanzania is more concerned about the potential consequences of the instability currently prevailing in Burundi. All neighbouring countries share the same concern, since it is true that the instability in Burundi signifies

for them inflow of refugees, instability in their own territory as a consequence of that prevailing in Burundi and which could transform into a generalised conflagration in the entire region. The imposition of sanctions should be seen as a preventive means of self defence aimed at avoiding seeing the region plunge into instability and chaos”.

30. Tanzania further emphasises that “in fact, all the sanctions that were adversely affecting the ordinary Burundian citizen were softened when the leaders of the Great Lakes countries met in Arusha on 16 April 1997. This included the lifting of the sanctions on food products, school materials, construction materials, as well as all medical items, and agricultural products and inputs”.
31. “The sixth Summit of the Great Lakes countries held in Kampala on 21 February 1998, unanimously decided to maintain the sanctions against the Burundian military regime. In this vein, the enforcement of the sanctions shall be scrupulously monitored by the organ established for this purpose; this is with a view to ensuring the implementation of the decisions taken by the countries of the region. It is important to note that the sanctions were declared by the countries of the region and not unilaterally by Tanzania. Hence, if ASP-Burundi has a just cause to defend, it should do so against the region and not against Tanzania”.
32. At its 24th session held in Banjul, The Gambia, after hearing the Rwandan Ambassador, who presented his government’s position on this affair, and considering the responses of Zambia and Tanzania, the Commission decided to address a recommendation to the Chairman in Office of the Organisation of African Unity (OAU), with a copy to the Secretary General, requesting the States involved in the affair to find means of reducing the effects of the embargo. It was however stressed that this should be without any prejudice to the decision that the Commission would take on the merit of the communication.
33. The Secretariat wrote to the parties informing them of the Commission’s decision.
34. On 26th March 1999, the Secretariat received the reaction of the author of the communication to the Tanzanian and Zambian memoranda. In its view, Tanzania’s argument that it did not violate art. 4 of the African Charter is baseless. It argues that “after the coup d’état security in the country improved considerably. On the contrary, the embargo deprived the Burundian people of their basic needs, especially as regards health care and nutrition, claiming many victims”.
35. It continues: “Tanzania claims not to have violated art. 17 of the Charter with the argument that the embargo was relaxed in April 1997. This shows a *contrario* that before the relaxation, which had no effect in reality, the said provision had been violated; that is from 31/07/96 to April 1997”.
36. According to the plaintiff, “Tanzania also claims not to have violated art. 22 of the Charter with the argument that of all human rights, it is what it refers to as the “political right” that matters most”. It continues by saying that Tanzania’s argument is unfounded since “...the right to life for example is more important than any “political right”. The choice is clear between someone who takes your life and someone who denies you your right to elect your head of State”.

37. According to the plaintiff, “all groups that are attacking Burundi – PALIPEHUTU, FROLINA, CNDD... etc. – operate from that country”.
38. The Complainant avers, “Tanzania claims not to have violated art. 3 items 1, 2, 3 of the OAU Charter. But imposing on Burundi a manner whereby it can “resolve” its internal problems, under the pressure of an embargo, undoubtedly constitutes interference in the internal affairs of Burundi”.
39. The Complainant continues: “it is evident that Tanzania violated international law by imposing an embargo on Burundi. ASP-Burundi hereby calls on the African Commission on Human and Peoples’ Rights to declare that country guilty and condemn it to pay damages”. As regards the memorandum submitted by Zambia, the plaintiff states that:
40. “Zambia claims not to have violated resolution 2625 of the United Nations with the argument that the UN had approved the decision to impose the embargo. Whether the UN approved the measure or not changes nothing, for the initiative should have come from the United Nations and not the other way around! Hence, the decision to impose the embargo had no legal basis”.
41. It continues: “along the same line of thought, Zambia claims that it did not violate Art. 3(1), (2), and (3) of the OAU Charter for the reason that the OAU had approved the embargo. Once again, the approval came after the fact. It was not the OAU that mandated these countries to impose the embargo”.
42. According to the petitioner, “Zambia claims [...] that it did not violate art. 4 of the African Charter on Human and Peoples’ Rights with the argument that in April 1997, some alleviation measures were introduced. ASP-Burundi points out that this provision was violated from the time of the imposition of the embargo (August 96) to the date those measures were introduced (April 97), and the measures did not even bear any effect in reality”.

From the foregoing, the Complainant draws the following conclusion:

43. “It is abundantly clear that Zambia, as well as Tanzania, have violated international law and that this violation caused very serious injury to the Burundian people. ASP - Burundi therefore urges the African Commission on Human and Peoples’ Rights to declare Zambia guilty of this and to constrain it to pay the relevant damages”.
44. On 24 March 2000, the Secretariat received a Note Verbale from the Kenyan Ministry of Foreign Affairs requesting a copy of the communication submitted by ASP-Burundi. The request was met, and a reaction is still being awaited.
45. At its 27th ordinary session held in Algeria, the Commission examined the case and deferred its further consideration to the next session.
46. The Commission’s decision was communicated to the parties on 20 July 2000.
47. On 17th August 2000, the Secretariat of the Commission received a Note Verbale from the Ministry of Foreign Affairs of the Republic of Uganda claiming that it had never been notified of the existence of this communication.

48. On 21st August 2000, the Secretariat of the Commission replied the said Ministry stating among other things that such notification had long been served the competent authorities of the Republic of Uganda, in 1996, as soon as the case was filed. A copy of the communication was however forwarded to the Ministry.
49. During the 28th ordinary session held in Cotonou, Benin, from 26 October to 6 November 2000, the Commission considered the communication and noted that although Ethiopia was a party to the case, it had never received notification of the communication.
50. The Commission therefore asked the Secretariat to check whether Ethiopia had ratified the African Charter at the time the decision on the embargo was taken.
51. If it had, the Secretariat should then send it notification of the communication opposing that embargo and ask for its comments and observations on the issue.
52. Given that Ethiopia ratified the African Charter two years after the decision to impose the embargo on Burundi was taken, the Secretariat of the Commission did not send a copy of the case file to Ethiopia for notification.
53. The Secretariat acted in this manner in accordance with the decision taken by the 28th ordinary session of the Commission.
54. Moreover, this decision of the Commission is in line with the principle of non-retroactivity of the effects of agreements, which is contained in Article 28 of the Vienna Convention on Treaties.
55. The Secretariat informed the concerned parties about the decision of the 30th session, and the Tanzanian and Zambian Embassies in Addis Ababa reacted by saying that their respective Governments were never informed of this case and they requested to be given a copy of the case-file.
56. In reply, the Secretariat conveyed the documents requested to the two Embassies, as well as all necessary information that could help elucidate the progress of the case submitted to the Commission, in respect of which their States had contributed by submitting defence statements.
57. At the 31st session (2-16 May 2002, Pretoria, South Africa), delegates from some of the accused States (DRC, Rwanda, Tanzania, Uganda and Zambia) presented some oral comments on the position of their respective Governments during the Commission's consideration of the communications.
58. The said delegations in turn flatly rejected the allegations levelled against their Governments pointing out in a nutshell, that :-
 - The sanctions adopted by the summit of the countries of the Great Lakes region held on 31 July 1996, in Arusha, Tanzania, was not aimed at providing advantages to the countries that made the decisions but, were meant to put pressure on the Government brought about by the military coup d'etat of 25 July 1996 in Burundi, with a view to bringing it to restore constitutional legality, democracy, peace and stability.

- The joint initiative taken by their Governments were part of their contribution to the international efforts aimed at promoting the rule of law, in spite of the sacrifices that this initiative entailed for the people of the countries that initiated the embargo against Burundi, who also suffered from the consequences of the said embargo.
59. After the session, the Secretariat informed the States concerned and the Complainants about the status of the communication by Note Verbale and by letter respectively.
 60. At the 32nd Session held from 17th to 23rd October 2002, in Banjul, The Gambia, the Commission was unable to consider the merits of Communication, because of time constraints occasioned by the reduction of this session's duration.
 61. The African Commission consequently deferred consideration of the matter to its 33rd Ordinary Session scheduled to take place from 15th to 29th May 2003, in Niamey, Niger.
 62. The African Commission considered this communication during the 33rd Ordinary Session and decided to deliver its decision on the merits.

LAW

Admissibility

63. The Commission had to resolve the matter of the *locus standi* of the author of the communication. It would appear that the authors of the communication were in all respects representing the interests of the military regime of Burundi. The question that was raised was whether this communication should not rather be considered as a communication from a state and be examined under the provisions of Articles 47-54 of the African Charter. Given that it has been the practice of the Commission to receive communications from non-governmental organisations, it was resolved to consider this as a calls action. In the interests of the advancement of human rights this matter was not rigorously pursued especially as the Respondent states did not take exception by challenging the *locus standi* of the author of the communication. In the circumstances the matter was examined under Article 56.
64. Under article 56(5) and (6) of the African Charter on Human and People's Rights, communications other than those referred to in Article 55 received by the Commission and relating to human and people's rights shall be considered if they -:
 - (5) "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged";
 - (6) "are submitted within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized with the matter".
65. These provisions of the African Charter are hardly applicable in this matter inasmuch as the national courts of Burundi have no jurisdiction over the state Respondents herein. This is yet another indication that this communication appropriately falls under *Communications from States* (Articles 47-54).
66. However, drawing from general international law and taking into account its mandate for the protection of human rights as stipulated in Article 45(2), the Commission takes the view that the communication deserves its attention and declares it admissible.

Merits

67. The communication was submitted by the *Association pour la Sauvegarde de la Paix au Burundi* against States of the Great Lakes region (DRC, Kenya, Rwanda, Tanzania, Uganda, Zambia) and Ethiopia, in the wake of an embargo declared by these countries against Burundi on 31 July 1996, following the coup d'état carried out by the Burundian army on 25 July against the democratically elected government.
68. The communication alleges that by its very existence this embargo violated and continues to violate a number of international obligations to which these States have subscribed, including those emanating from the provisions of the Charter of the Organisation of African Unity (OAU), the African Charter on Human and Peoples' Rights, as well as Resolution 2625 (XXV) of the General Assembly of the United Nations on the principles of international law applicable to friendly relations and cooperation between States on the basis of the United Nations Charter.
69. The States accused in the communication, particularly Zambia and Tanzania which submitted written conclusions on the case, reject the allegations against them, stating among other things, that while it is true that the decision to impose an embargo against Burundi was taken at the Arusha summit of 31 July 1996 at which they participated, (with the exception of Zambia, which only joined the others after the Arusha decision), it is equally true that following this, the decision to impose an embargo against Burundi was endorsed by the Organisation of African Unity and the United Nations Security Council.
70. The decision to impose the embargo against Burundi is thus based, by implication, on the provisions of Chapters VII and VIII of the United Nations Charter, regarding "Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression" and "Regional Arrangements", in the sense that the military coup which deposed the democratically elected government constituted a threat to, indeed a breach of, the peace in Burundi and the region.
71. The Respondent States took collective action as a sub-regional consortium to address a matter within the region that could constitute a threat to peace, stability and security. Their action was motivated by the principles enshrined in the Charters of the OAU and of the United Nations. The Charter of the OAU stipulates that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples." It goes on to promote international cooperation "to achieve a better life for the peoples of Africa..."
72. The resolution to impose the embargo on Burundi was taken at a duly constituted summit of the states of the Great Lakes Region who had an interest in or were affected by the situation in Burundi. The resolution was subsequently presented to the appropriate organs of the OAU and the Security Council of the United Nations. No breach attaches to the procedure adopted by the states concerned. The embargo was not a mere unilateral action or a naked act of hostility but a carefully considered act of intervention which is sanctioned by international law. The endorsement of the embargo by resolution of the Security Council and of the summit of Heads of State and Government of the OAU does not merit a further enquiry as to how the action was initiated.

73. The United Nations Security Council is vested with authority to take prompt and effective action for the maintenance of international peace and security. In doing so, states agree that the Security Council “acts on their behalf...” This suggests that, once endorsed by resolution of the Security Council, the embargo is no longer the acts of a few neighbouring states but that it imposes obligations on all member states of the United Nations.
74. The Charter of the United Nations allows that member states of the UN may be called upon to apply measures including, “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations...” Economic sanctions and embargoes are legitimate interventions in international law.
75. The critical question and one which may affect the legitimacy of the action is whether such action as has been determined is excessive and disproportionate, is indiscriminate and seeks to achieve ends beyond the legitimate purpose. Sanctions therefore cannot be open-ended, the effects thereof must be carefully monitored, measures must be adopted to meet the basic needs of the most vulnerable populations or they must be targeted at the main perpetrators or authors of the nuisance complained of. The Human Rights Committee has adopted a General Comment in this regard precisely in order to create boundaries and limits to the imposition of sanctions.
76. We are satisfied that the sanctions imposed were not indiscriminate, that they were targeted in that a list of affected goods was made. A monitoring committee was put in place and situation was monitored regularly. As a result of these reports adjustments were made accordingly. The report by the Secretary General of the OAU is indicative of the sensitivity called upon in international law: “...besides their political, economic and psychological impact, they (the sanctions) continue to have a harsh impact on the people. The paradox is that they enrich the rich and impoverish the poor, without effectively producing the desired results... It would, perhaps, be appropriate to review the question of the sanctions, in such a way as to minimise the suffering of the people, maximise and make effective the pressures on the intended target” (CM/2034 (LXVIII), 68th Ordinary Session of the Council of Ministers, Ouagadougou, 1-6 June 1998).
77. We accept the argument that sanctions are not an end in themselves. They are not imposed for the sole purpose of causing suffering. They are imposed in order to bring about a peaceful resolution of a dispute. It is self-evident that Burundians were in dispute among themselves and the neighbouring states had a legitimate interest in a peaceful and speedy resolution of the dispute.
78. With regard to the allegations of interference in the domestic affairs of other sovereign states, the Commission recognises that international law has provided careful procedures where such interference may be legitimate. It is our view that the present matters falls on all fours with the provisions of international law.
79. Having thus dismissed the seminal charges against the Respondent states, however, the Commission wishes to observe that the matters complained of here have now been largely resolved. The embargo has been lifted and by the agency of the OAU and with the active participation of neighbouring states a peace process is underway in Burundi.

For these reasons, the African Commission,

Finds that the Respondent States are not guilty of violation of the African Charter on Human and Peoples' Rights as alleged.

Takes note of the entry into force of the Burundi Peace and Reconciliation Agreement, alias Arusha Accords, and that the Respondent States in the communication are among the States that have sponsored the said Accord.

Also notes the efforts of the Respondent States aimed at restoring a lasting peace, for the development of the rule of law in Burundi, through the accession of all Burundian parties to the Arusha Accord.

Welcomes the entry into force of the Constitutive Act of the African Union in 2000 to which the Republic of Burundi and all the Respondent States are now party, and which also provides for the promotion and respect of human and peoples' rights and the explicit censure of States that "come to power by unconstitutional means".

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

197/97 - Bah Ould Rabah/Mauritania

Rapporteurs:

- 22nd session: Commissioner Ondziel-Gnelenga
- 23rd session: Commissioner Ondziel-Gnelenga
- 24th session: Commissioner Ondziel-Gnelenga
- 25th session: Commissioner Ondziel-Gnelenga
- 26th session: Commissioner Rezag-Bara
- 27th session: Commissioner Rezag-Bara
- 28th session: Commissioner Rezag-Bara
- 29th session: Commissioner Rezag-Bara
- 30th session: Commissioner Rezag-Bara
- 31st session: Commissioner Rezag-Bara
- 32nd session: Commissioner Rezag-Bara
- 33rd session: Commissioner Rezag-Bara
- 34th session: Commissioner Rezag-Bara
- 35th session: Commissioner Rezag-Bara

Summary of facts

1. In November 1975, four years after the death of his mother, Mr. Bah Ould Rabah, a Mauritanian national (the plaintiff) and his family were forcefully expelled from their ancestral domicile by the man named Mohamed O. Bah on the grounds that the mother of the plaintiff, the late Aichetou Valle, was his slave and that subsequently, the house bequeathed to her descendants and the whole estate around it became legally the property of Mohamed O. Bah, the alleged "owner" of the deceased.
2. When the plaintiff approached them, the local authorities and the courts decided in favour of his opponent and the Supreme Court upheld this decision. The plaintiff wrote to the highest authorities, including the President of the Republic, to contest this decision which he qualifies as "flagrant support of the Government to the illegal institution of slavery". To date, however, he has received no reply.

Complaint

3. The Communication alleges violation of Articles 2, 3, 4, 5, 6, 7, 9 and 11 of the African Charter.

Procedure

4. Communication 197/97 is dated 11th April 1997.
5. The African Commission assumed jurisdiction in the case during its 21st ordinary session held in Nouakchott, Mauritania, in April 1997.
6. On 7th July 1997, a note verbale of notification was sent to the Government concerned urging it to reply to the allegations contained in the Communication.
7. On 7th July 1997, the plaintiff was informed of the decision of seizure.

8. During the 22nd ordinary session, the Commission deferred any decision on this Communication pending the reception of the comments from the Government of Mauritania on the report of the mission undertaken to that country.
9. The African Commission continued the process of exchanging information between the parties.
10. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW

Admissibility

11. Article 56(5) of the African Charter on Human and Peoples' Rights requires that Communications received within the context of the provisions of Article 55 should be submitted "after exhaustion of all local remedies, if they exist, unless it is clear to the Commission that this procedure is being unduly prolonged".
12. In the case under consideration, the plaintiff filed court decisions attesting that he used and exhausted the remedies before the competent national courts with a view to obtaining compensation for the alleged violation of his rights.
13. The Complainant furnished the African Commission with the judgement of the Boutilimitt District Court of 26th December 1998, the decision of the Rosso Regional Court of 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott of 11th November 1990.
14. The African Commission contacted the Respondent State demanding for information with respect to exhaustion of local remedies and the Respondent State responded by stating that local remedies had been exhausted.
15. It is therefore unquestionable that the Complainant had met the provisions of Article 56(5) of the African Charter.
16. On these grounds, the African Commission declares the Communication admissible.

Merits

17. The Complainant alleges a violation of the following Articles of the African Charter:
 - a) *Article 2: right to enjoyment of the rights and freedoms recognized and guaranteed in the Charter, such as the right to property, without any distinction;*
 - b) *Article 3: right to equality and to equal protection of the law;*
 - c) *Article 4: inviolability of the human being, the right to physical and moral integrity;*
 - d) *Article 5: right to human dignity, recognition of his legal status, prohibition of all forms of exploitation and degradation, particularly slavery;*
 - e) *Article 6: right to liberty and security;*

- f) *Article 7: right to have his cause heard (particularly paragraph 1(d), impartiality of the courts);*
- g) *Article 8: freedom of conscience;*
- h) *Article 9: right to information, freedom of opinion;*
- i) *Article 11: right to assemble freely with others.*

18. The Complainant states that in particular that his sisters, brothers and himself have been deprived of the inheritance of their parents, 4 years after the death of his mother, by Mr. Bah Ould Mohamed, on the grounds that their late mother was his slave.
19. In order to get round the ban on slavery in force in Mauritania, Mohamed Moustapha made mention of a donation supposedly given to him by the late mother of the plaintiff.
20. In a letter of 7th April 1990 addressed to the Head of State by Bah Ould Rabah (the Complainant) and copied to the case file, it is stated that to support his claims on the property of his late mother, Mohamed Moustapha (his opponent) had produced the certificate of occupancy No. 453 dated 24th November 1972.
21. This permit produced by Mohamed Moustapha had been prepared by the Cadi on the basis of evidence relating to the donation made by the late mother of the plaintiff to Mohamed Moustapha, his opponent.
22. The donation to Mohamed Moustapha was supposedly meant to render freedom to Lady Merien, daughter of the plaintiff's mother, his slave, but Mohamed Moustapha's submissions show no tangible evidence of the reason for his being the beneficiary of this donation.
23. The Complainant alleges that some of the witnesses who supported the argument of donation to his opponent later retracted, and he made mention of names such as Imam Mohamed Hamed and others in the letter addressed to the Head of State.
24. The Complainant further alleges, in the same letter, that in opposition to the certificate of occupancy produced by opponent, he had produced a certificate occupancy No. 66 of 24th April 1971, issued in the name of his mother a few months before her death; that the said document dates before that produced by his opponent.
25. The Complainant also pointed out serious procedural irregularities in the processing of the case in that he had requested the competent legal Authorities in vain, to order an investigation which would have proved Mohamed Moustapha's allegations baseless and proved as a result, the pertinence of the said violations of Article 14 of the African Charter relating to the guarantee of his and his family's right to property.
26. The Government of the Islamic Republic of Mauritania provided an explanation, through the statement made by its delegation at the 29th Ordinary Session of the African Commission; this statement was confirmed and supplemented by a

document dated 19th June 2001 filed in court. From these documents it would appear that where the Respondent State is concerned -:

- a) The Communication 197/97 introduced against the State of Mauritania by Mr. Bah Ould Rabah is based on a dispute relating to the ownership of a real estate which opposes two Mauritania citizens, Mr. Bah Ould Rabah (the Complainant) and Mr. Mohamed Moustapha Ould Bah;
- b) This case is simply a classical dispute about real estate property between members of the same family in which the intervention of the Cadi is in keeping with the existing law and practice in Mauritania;
- c) It was on the request of Mr. Bah Ould Rabah that the Mauritanian Courts, had, within a reasonable period, passed judgement through the District Court of Boutilimitt on the 26th December 1998, the decision of the Regional Court of Rosso on the 11th March 1990 and the decision of the Supreme Court of Mauritania in Nouakchott on 11th November 1990;
- d) It would appear from his own submission that the plaintiff recognized that the Courts seized had arrived at a final decision on the basis of facts derived from the documents presented by himself and his opponent (namely the certificates of occupancy), which is in conformity with the rules within their competence and thereby indicates that the dispute relates to the right to ownership of property and that the conflicting parties have enjoyed the conditions of a fair trial, with the participation of their lawyers in the proceedings and in the hearings;
- e) His allegations relative to slavery and the violation of his rights were baseless;
- f) The Government of Mauritania admits that undoubtedly the consequences of slavery, against which it continues to fight, still linger on in the country. But this is not sufficient to justify the allegations of Rabah Ould Bah (the Complainant) relative to the issue of slavery raised by Mohamed Bah (his opponent) before the Mauritanian Courts, in violation of the African Charter and its provisions as mentioned above;
- g) Accordingly, Bah Ould Rabah (the Complainant) should have all his claims dismissed.

27. The African Commission has noted that no document exists in the case file which clearly delineates the reason for the donation made to Mohamed Moustapha by the late mother of the Complainant and also that there is no opposing statement to the effect that the witnesses named by the plaintiff had retracted their statements after having given evidence before the Cadi in support of Mohamed Moustapha.

28. The African Commission realises that Mr. Bah Ould Rabah had enjoyed all the conditions of a fair trial and had thus exhausted all the local remedies. The fact that he had lost the case after exhausting the procedures he had initiated was due to a weak judicial system and not on the basis of the practice of slavery or slave like practices. In fact, slavery had been abolished (order No. 81.234 of 9th June 1981 and 1991 Constitution).

29. The African Commission further noted that from the information in its possession (report of the mission to Mauritania, statements made by NGOs and the delegates from Mauritania during the various Sessions of the African Commission as well as from diverse documents from the Government of the

Republic of Mauritania), that the consequences of slavery still persist in Mauritania and that, for people to act as Mohamed Moustapha Ould Bah has done has become common practice in the country.

30. Furthermore in the African Commission's view, to accept that someone, and a mother for that matter, can deprive her own children of their inheritance for the benefit of a third party, with no specific reason as in this case, is not in conformity with the protection of the right to property (Article 14 of the African Charter).
31. The African Commission thus calls upon all the public institutions in the Islamic Republic of Mauritania to persevere in their efforts so as to control and eliminate all the offshoots of slavery.

For these reasons;

- a) **The African Commission considers that the dispossession of the plaintiff of part of his mother's heritage, through a donation without well-substantiated reasons, constitutes a violation of Article 14 of the African Charter on Human and Peoples' Rights.**
- b) **The African Commission recommends to the Government of the Islamic Republic of Mauritania to take the appropriate steps to restore the plaintiff his rights.**

Dissenting Opinion by Commissioner Yasir Sid Ahmad El Hassan, Vice-Chairperson of the African Commission On Human And Peoples' Rights

1. This is a dissenting opinion from the one that was adopted by a simple majority⁶ of the members of the Commission on communication 197/1997 during the 35th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21st May to 4th June 2004. The present dissenting opinion is based on facts and arguments derived from the original documents⁷ contained in the communication file.
2. Furthermore, most of the documents submitted by the parties to the communication were originally in Arabic and were never translated into English or French, the languages of the Commissioner, who was the first rapporteur or the legal officer working on the file at the Secretariat of the Commission. These documents contained the ruling of different local courts of the respondent state.

⁶ The decision on merits of the communication was taken in the absence of two Commissioners including the one who was the second rapporteur on the case. A third Commissioner abstained from the process because he is a national of the respondent state. Two other Commissioners did not take part in the deliberations made in Pretoria, South Africa upon and which the decision in this communication was taken by the Commission.

⁷ The decision on this communication was taken on the basis of the deliberations that took place during the 31st session of the Commission in Pretoria, South Africa in May 2002. The Secretariat of the Commission was requested to provide the Commissioners with transcripts of the oral statements by Commissioners. However, the Secretariat failed to make available the transcripts of the deliberations made in Arabic because of its inability to address the matter in Arabic due to the fact that no staff of the Secretariat can work in Arabic.

So the Commissioners made a decision relying only on the short and inaccurate summary of file that was given to them.

3. The essence of facts of this communication as extracted from the file shows that it was a normal civil litigation between two members of the same family over a plot of land. The complainant, a banker born in 1949, filed in 1986, a lawsuit in local courts in which he claimed the full title over this real estate.
4. The complainant originally argued before courts that the disputed land belongs to his father, and that his mother has no separate title to dispose of the land. The respondent⁸ claimed that the mother of the complainant has a separate property and transferred to himself and his sisters by the way of donation, this plot of land which constitutes part of her property. He further claimed that he was de facto in peaceful, continuous and uninterrupted possession of that land for 27 years consecutive before the claim of the complainant, which was brought before the courts only in 1986.
5. A decision of the District Court of Boutilimitt, the Court of Rosso, dated 26/12/1988, a decision of the Court of Appeal of Nouakchott dated 11/3/1990, and a decision of the Supreme Court dated 5/11/1990, ruled all in favour of the respondent on the grounds that the failure of the complainant to refute the strong evidence composes of antiquity of deeds and testimonies of reliable and credible witnesses as well as de facto possession of the disputed land. The Final ruling from the Supreme Court was delivered on 5/11/1990.
6. On April 11, 1997, the complainant filed this communication 97/1997 against the Islamic Republic of Mauritania.
7. The complainant claimed before the commission that in November 1975, that is four years after the death of his mother, he himself and his family were forcefully expelled from their ancestral home by Mohamed Ould Bah (his opponent) on the grounds that the complainant's mother, Aichetou Valle had been his slave and that, the house and the surrounding land therefore rightfully belonged to him.
8. The complainant further claimed that the courts of his country, which are State institutions, deprived him from his property and since then he wrote to the highest governmental authorities including the President of the Republic, protesting against this blatant governmental support for the illegal institution of slavery, but has received no reply as of this date.
9. Article 56 paragraph 6 of the African Charter on Human and Peoples' Rights requires that communication should be submitted within a reasonable period from the time when local remedies have been exhausted or from the date the Commission is seized with the matter
10. The complainant resorted to local courts only in 1986 whereas he alleged that he had been forcefully expelled from his home in 1975. And again he took more than six years after the Supreme Court delivered its final decision to submit his

⁸ Mohamed bin Mohamed Almustaffa.

communication to the Commission in April 1997. In my view, this can be considered as unreasonable period in term of Article 56 paragraph 6 of the African Charter, and accordingly the Commission ought to declare this communication inadmissible.

11. From the documents in the file, which contains the rulings of the Mauritanian courts at all levels and which were submitted to the Commission by both parties, it was not indicated anywhere that the recipient of the donation had claimed that the complainant's mother had donated the land because she was the slave of the recipient. On the contrary, the recipient indicated clearly that the complainant's mother donated the land to him because of the existence of good ties and relationship between the two of them. The complainant himself stated in his memo to the Court of Appeal of Nouakchott that his family is well-known for its good reputation and generosity.
12. The documents from the communication file also show that the claimant had neither raised these matters before the District Court of Boutilimitt, nor before the Court of Rosso or before the Court of Appeal.
13. The claimant has come up before the Commission with new arguments that he did not advance before the courts in Mauritania in the process of his case. Consequently, by bringing new elements which are neither raised nor disputed before national courts he wanted to use this Commission as a court of first instance. In my view, this is another reason for declaring this communication inadmissible.
14. The inability of the Secretariat of the Commission to work in Arabic whereas the original documents of the communication file are in this language, do inhibited the Commissioners ability to have first hand information. This made the Commission to act only on the translated summary of part of the documents of the communication, which in my view, was not built on facts but on the mere allegations of the complainant. Allegations, which were neither raised before National Courts nor well substantiated before the Commission.
15. The Commission in acting upon the assumption that those allegations are facts, wrongly decided that the Islamic Republic of Mauritania has violated Article 14 of the African Charter on Human and peoples` Rights.
16. The date of claim of donation (by opponent to the complainant) goes back to 1959 - according to complainant - or to 1975 when the complainant claims that the forceful eviction from disputed land took place.
17. One must note that the practice of slavery was legal in 1959 and 1975. Slavery was banned by the Mauritanian authorities in 1980. The recipient could therefore have easily based his claim of property over the disputed land on slavery. However, he did not do that. Instead, he claimed that the land was donated to him because the good relationship he had with the mother of the complainant.
18. The events in question took place by any way before 1986 when Mauritania became a party to the African Charter on Human and Peoples' Rights; the

admissibility of such a communication raises the question of the principle of retroactivity of laws which was not discussed by the commission in this very case.

19. The erection of building permissions No.453 dated 24th November, 1972, and No.66 of 24th April, 1971, (and not certificate of occupancy as mentioned in paragraphs 46 and 50 of the commission ruling) both discussed by Courts and ruled over that the later does not relate to the same plot of land.
20. I do agree with the Commission's conclusion that there is no evidence brought before the Commission that the witnesses retracted from their statements made before the Cadi in support of donation as stated in the last part of paragraph 53 the communication decision. This part of the above-mentioned mentioned paragraph negates the complainant's allegations as stated in paragraph 49 of the same document, and contradicts the final findings of the Commission.
21. Paragraphs 51 of the decision of the Commission states that the plaintiffs (complainant) requested an investigation to prove as a result, the pertinence of the said violations of article 14 of the African Charter on Human and peoples` Rights. This paragraph does not reflect the accuracy that the complainant claimed the violation of Article 14 of the Charter. The lengthy discussions by Commissioners, on whether the Commission could invoke article 14 of the charter that was not mentioned by the complainant prove this. Moreover, paragraphs 3 and 43 of the decision did not mention article 14 of the Charter.
22. The Mauritanian courts cannot restrain the right or freedom of the claimant's mother to dispose part of her property by way of donation to a member of her family without a legal basis, neither do they have the right to compel the claimant's mother to explain the reasons why she donated such property to one of her family members, while she is sane, mature and not restrained from disposing her property by a court order.
23. Had the Mauritanian courts prevented the claimant's mother from disposing of part of her property by donating it to a relative and deprived her son of that portion of property, they would have violated Article 14 of the African Charter on Human and Peoples' Rights, which related to the right to property and also embodies the rights to freely dispose of one's property.
24. The Mauritanian courts, by confirming the right of ownership of the claimant's mother and confirming her right to dispose of part of her property by the way of donation, confirmed that the claimant's mother's freedom to own her property and to dispose of it. By doing so, Mauritanian Courts furthermore, proved that she was neither a slave nor a servant.
25. The Commission, by deciding that the Islamic Republic of Mauritania had contravened Article 14 of the African Charter on Human and Peoples' Rights and recommending that the government should return the property to the claimant, had deprived the recipient from a property that was donated to him. The Commission has also, without a legal basis, restrained, the right and freedom of the claimant's mother to freely dispose of a part of her property in a manner she deemed fit. The Commission wanted to protect what it considered

to be the right of a citizen (the complainant). However, in doing so it advised the government to do what constitutes a violation of the rights of two citizens: the mother of the complainant and the recipient.

26. For all the foregoing reasons, I believe that the Commission had erred in this communication, by deciding that the Islamic Republic of Mauritania had violated the provisions of Article 14 of the African Charter on Human and Peoples' Rights.

**Done at the 35th Ordinary Session held in Banjul, The Gambia from
21st May to 4th June 2004**

199/97 Odjouriby Cossi Paul/Benin

Rapporteur:

- 22nd Session: Commissioner Nguéma
- 23rd Session: Commissioner Nguéma
- 24th Session: Commissioner Nguéma
- 25th Session: Commissioner Nguéma
- 26th Session: Commissioner Nguéma
- 27th Session: Commissioner Nguéma
- 28th Session: Commissioner Nguéma
- 29th Session: Commissioner Nguéma
- 30th Session: Commissioner Sawadogo Salimata
- 31st Session: Commissioner Sawadogo Salimata
- 32nd Session: Commissioner Sawadogo Salimata
- 33rd Session: Commissioner Sawadogo Salimata
- 34th Session: Commissioner Sawadogo Salimata
- 35th Session: Commissioner Sawadogo Salamata

Summary of facts:

1. The Complainant is a national of Benin who alleges violation of his rights by the judiciary of his country.
2. It is alleged that the Appeal Court of Cotonou refused to restore his rights in a case pending before the said court since 1995 which sets him up against Mr. Akitobi Honoré whom he accuses of having despoiled him of his real estate property with the complicity of some judges.
3. The Complainant considers that the attitude of the Appeal Court constitutes a denial of justice.

Complaint

4. The Complainant alleges violation of Articles 7 and 14 of the African Charter

Procedure

5. The Secretariat of the African Commission acknowledged having received the communication on 8th April 1997.
6. The African Commission was seized of the communication at its 22nd ordinary session and deferred its decision on admissibility to its 23rd ordinary session scheduled for April 1998.
7. During its 23rd session held from 20th to 29th 1998 in Banjul, The Gambia, the African Commission declared the communication admissible and deferred consideration of the merits of the case to its 24th ordinary session.
8. On 1st June 1998, a note was sent to the Government of Benin informing them that the communication had been declared admissible by the African Commission, pursuant to Article 56 paragraph 5, and that the Commission would

rule on the merits during its 24th ordinary session scheduled for October 1998. A letter with the same message was sent also to the Complainant.

9. During the 28th Ordinary Session, the African Commission heard both parties. Through its representative, the Respondent State asked the African Commission to review its decision on admissibility as the Complainant had not exhausted local remedies.
10. The African Commission, noting that the Complainant had not put his case across logically, advised some NGO's to assist him. To this end, the case was entrusted to Interights and to the Institute for Human Rights and Development in Africa on behalf of the Complainant.
11. In any case, the African Commission took note of the undue delay of the Complainant's case before the courts.
12. From the submissions, it became apparent that in a civil case like this one, the conduct of proceedings is the responsibility of the parties in the case. The appeal filed against the judgment of the court of first instance is dated 19th September 1995 and the Commission was seized of the case on 8th April 1997, that is 20 months after the filing of the appeal. It appears from the practice of the Appeal Court accepted by the Supreme Court that average period ranges between 4 and 5 years.
13. The African Commission upheld its decision on admissibility and deferred its decision on the merits to the 30th Ordinary Session held in Banjul, The Gambia, from 13th to 27th October 2001.
14. The communication was deferred on several occasions because the Complainant was not very familiar with the procedures of the African Commission.
15. The African Commission considered this communication at its 35th Ordinary Session held in Banjul, The Gambia and decided to deliver its decision on the merits.

LAW

Admissibility

16. Article 56 of the Charter provides, among other things, that communications shall be considered by the Commission if they -:
(5) : "are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged".
17. Odjouoriby Cossi Paul (the Complainant) claims that the case opposing him to Mr Akitobi Honore has been pending before the Appeal Court of Cotonou since 19th September 1995 and that up to now the Court has delivered no judgment.
18. And yet, it is obvious that the local proceedings will remain in impasse as long as the Appeal Court has not made any ruling on the appeal pending before it.

19. The African Commission has moreover established the evidence of silence of the State of Benin to all the notifications and other requests for clarification addressed to it through its Secretariat.
20. This situation has led the African Commission to rule on the admissibility of the communication submitted to it on the basis of the facts brought to its attention by the Complainant.
21. In accordance with the provisions of Article 7, paragraph 1(d) of the African Charter and its previous decisions, (cf. in particular ²communication 39/90, Annette Pagnouille – on behalf of A. Mazou/Cameroon⁹), the Commission considered that the waiting period before the Appeal Court of Cotonou had been unduly prolonged and on these grounds, it had declared the communication admissible.
22. Details brought later to the case file by Interights and the Institute for Human Rights and Development as well as by the Government of Benin indicate that:
 - Following an appeal lodged by the two parties, the case was the subject of a joinder by interlocutory decision dated 9th March 1996.
 - After several adjournments due mainly to non attendance by one or the other party at the hearings, the court gave judgment by default on 5th August 1999 indicating that non production of the disputed decision and conclusions by the parties causes damage to the smooth administration of justice.
 - Mr. Akitobi Honoré, the opponent of Mr. Odjouri, lodged an appeal against this decision and Mr. Yansunnu, counsel of Mr. Odjouri, submitted further pleadings in defence before the chamber of the Supreme Court on 27th June 2001.
23. But the African Commission maintains that in any case, the State of Benin remains the guarantor of a good administration of justice on its territory and for the reasons, the African Commission upholds its decision on admissibility.

Merits

24. The African Charter on Human and Peoples' Rights stipulates in Article 7, paragraph 1(d) that « every individual shall have the right to have his cause heard. This comprises...the right to be tried within a reasonable time ».
25. On 19th September 1995, the plaintiff lodged an appeal against judgment No. 75/95 4^o CCM delivered on 7th August 1995 by the civil chamber of the court of first instance of Cotonou in its provisions on damages granted to him by the said court.
26. On his part, Mr. Honoré Akitobi (the opponent of Mr. Odjouri) filed a cross-appeal in reply to the principal appeal and as pointed out earlier, the proceedings pending before the appeal court are unduly prolonged.

⁹ Communication N°39/90: Annette Pagnouille on behalf of Abdoulaye Mazou c/ Cameroon. The victim had unsuccessfully initiated many proceedings both non-contentious and contentious. The Commission felt then that local remedies had been exhausted

27. Accordingly, the African Commission observes that the case before the Appeal Court has been unduly prolonged.
28. The African Commission is of the view that this undue prolongation of the case at the level of the Appeal Court is contrary to the spirit and the letter of above-mentioned Article 7(1)(d).
29. Concerning the allegations of the plaintiff of violation of his right to property, the Commission recalls that the right to property is recognized and guaranteed by the African Charter of which Article 14 stipulates that this right may be encroached upon only “in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”.
30. The African Commission, however, is of the opinion that to the extent that there has been no definitive decision in this case, it cannot substitute itself to the national courts to appreciate violation of the enjoyment of the right to property of the plaintiff.

For these reasons the African Commission,

Finds the Republic of Benin in violation of Article 7(1)(d) of the African Charter;

Requests the Republic of Benin to take appropriate measures to ensure that the Complainant’s appeal is determined by the Court of Appeal as quickly as possible; and

Urges the Republic of Benin to take the necessary steps to pay appropriate compensation for damages suffered by Mr Odjhouriby Cossi Paul due to the unduly prolonged proceedings in the processing of his case.

Rapporteur:

- 29th Session: Commissioner Andrew R. Chigovera
- 30th Session: Commissioner Andrew R. Chigovera
- 31st Session: Commissioner Andrew R. Chigovera
- 32nd Session: Commissioner Andrew R. Chigovera
- 33rd Session: Commissioner Andrew R. Chigovera
- 34th Session: Commissioner Andrew R. Chigovera

Summary of Facts:

1. The communication is submitted by Edward Luke II of Luke and Associates, Saul Lehrfreund of Simons Muirhead and Burton (practising advocates based in the United Kingdom and Botswana) and Interights, a human rights NGO based in the United Kingdom on behalf of Mariette Sonjaleen Bosch who is of South African nationality.
2. Mrs. Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001.
3. The Complainant alleges that the judge who convicted Mrs. Bosch wrongly directed himself that the burden of proof was on the accused "*to prove on a balance of probabilities*" that someone else was responsible for the killing and thereby reversing the presumption of innocence. That the Court of Appeal wrongly upheld the conviction despite recognising the fact that the judge had fundamentally erred by reversing the onus of proof.
4. The Complainant further alleges that her right to life has been violated by the imposition of the death penalty for what was alleged to be a crime of passion, in circumstances where there were clearly extenuating circumstances.
5. It is also alleged that Mrs. Bosch is likely to suffer inhuman treatment and punishment because the execution will be carried out by the cruel method of death by hanging, which exposes the victim to unnecessary suffering, degradation and humiliation.

Complaint

6. The Complainant alleges a violation of **Articles 1, 4, 5 and 7(1)** of the African Charter on Human and Peoples' Rights.

Procedure

7. The communication was received at the Secretariat of the Commission 7th March 2001 by fax.

8. On 12th March 2001, the Secretariat of the African Commission wrote to Interights requesting for complete copies of the judgements of the High Court and Court of Appeal of Botswana.
9. On 26th March 2001, the Secretariat of the Commission received by courier the full text of the judgement of the Court of Appeal of Botswana delivered on 30th January 2001 and expert affidavits relating to the manner and speed in which a person executed by hanging would meet their death.
10. On 27th March 2001, the Chairman of the Commission wrote to the President of Botswana appealing for a stay of execution pending consideration of the communication by the Commission.
11. The President of Botswana did not respond to the appeal but information received at the Commission indicates that Mrs. Bosch was executed by hanging on **31st March 2001**.
12. At its 29th ordinary session, the Commission decided to be seized of the Complaint and the parties to the communication were informed of this decision.
13. At its 30th ordinary session held in Banjul, The Gambia, the Commission heard oral submissions from the Complainants and declared the communication admissible.
14. On 9th November 2001, the Secretariat informed the parties of the decision of the African Commission and requested them to transmit their written submissions on admissibility and on the merits to the Secretariat.
15. The African Commission continued the process of exchanging information between the parties.
16. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW

Admissibility

17. The admissibility of communications brought pursuant to Article 55 of the Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which generally must be fulfilled by a Complainant for a communication to be declared admissible.
18. The Complainants submit that they have fulfilled all the conditions of Article 56 of the African Charter. They argue that Mrs Bosch was convicted of the murder of Maria Magdalena Wolmarans by the High Court of Botswana on 13th December 1999 and sentenced to death. She appealed to the Court of Appeal of Botswana, which dismissed her appeal on 30th January 2001. On 7th March 2001, 35 days after the Court of Appeal of Botswana had handed down its decision dismissing Mrs Bosch's appeal, the Complainant filed this communication with the African Commission. They submit that this matter has not been submitted for examination under any other procedure of international investigation or settlement. The Complainants also

state that all local remedies were exhausted and the complaint was filed with the African Commission within a reasonable time from the time local remedies were exhausted. Therefore the African Commission should declare the communication admissible.

19. In their response, the Respondent State concedes that all local remedies in this matter were exhausted, as the Court of Appeal is the last and final court in Botswana.
20. The Commission notes that the Respondent State and the Complainants agree that all domestic remedies were exhausted and thus declares the communication admissible.

Merits

21. Three issues relating to alleged violations of the African Charter were originally raised on behalf of the applicant. A fourth issue, namely whether or not there was a violation of Articles 1,4, and 7(1) in declining to respect the indication of provisional measures was added when consolidated submissions were made. Two further issues were added in the document entitled “Note of Applicant’s Submissions” circulated at the 31st Session bringing the total number of issues to six. One of the six issues namely “whether the methods of execution in Botswana, by hanging, breached Article 5 of the African Charter” was abandoned during the hearing of the matter at the African Commission’s 31st Ordinary Session. Each of the remaining issues will be dealt with in turn.

Alleged Violation of the Right to Fair Trial

22. With regard to the alleged violation of the right to fair trial under Article 7 (1)(b) of the African Charter, the issue is whether the misdirection by the trial judge in regard to the onus of proof was so fatal as to negate the right to fair trial in the circumstances of this case. Simply put, does a misdirection per se vitiate the holding of a fair trial in violation of Article 7 of the African Charter and of necessity leads to the quashing of a conviction with capital consequences.
23. In this regard, it was submitted that the placing of the burden of proof on the applicant was a violation of a fundamental right such as would negate the holding of a fair trial and that the court of appeal wrongly held that this did not result in a miscarriage of justice.
24. In dealing with this issue it is important to recognise that there is no general rule or international norm stating that any misdirection per se vitiates a verdict of guilt. As pointed out by the State Party, what is generally accepted in several countries particularly common law countries is the rule that a misdirection will vitiate a verdict of guilt only where such misdirection either on its own or “cumulatively is or are of such a nature as to result in a failure of justice.” The legal position is aptly stated in Archbold, Criminal Pleading and Practice ¹⁰ as follows”.

“The very basic and fundamental function of the courts of justice is to ensure that no substantial miscarriage of justice is allowed through the operation of the judicial process. The courts cannot

¹⁰ 200 Ed at page 18

be seen to undermine the very foundation for the existence of the judiciary, namely justice, unaffected by technicalities and sophistry of the legal profession”.

In other words, where a court is satisfied that despite any misdirection or irregularity in the conduct of the trial the conviction was safe, the court would uphold such conviction.

25. The Court of Appeal thoroughly examined the evidence led at the trial and the effect of the misdirection and came to the conclusion that there was a massive body of evidence against the Applicant which would lead to no other conclusion than that it was the applicant and no one else who murdered the victim and that the quality of the evidence was such that no miscarriage of justice was occasioned.
26. A breach of Article 7 (1) of the African Charter would only arise if the conviction had resulted from such misdirection. As pointed out by the Court of Appeal at page 47 of the judgement, the trial judge “meticulously evaluated the evidence and came to the only conclusion possible on the evidence”.
27. A number of decisions have been taken in the European Court of Justice on Article 6 (2) of the European Convention on Human Rights which also provides for the presumption of innocence. In discussing Article 6(2), R. Clayton and H. Tomilson observe¹¹ that the Article does not prohibit presumption of facts and law and citing *Salabiaku v France* (1988) 13 EHRR 379 paragraph 28 states that the State must however,
*“Confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence”*¹².

A more appropriate discussion of Article 6(2) can be found in the Digest of Case-Law Relating to the European Convention on Human Rights (1955-1967)¹³ where it is stated that,

*“If the lower court has not respected the principle of presumption of innocence, but the higher court in its decision has eliminated the consequences of this vice in the previous proceedings, there has been no breach of Article 6 (2)”*¹⁴

28. As already discussed above, the Court of Appeal ‘meticulously evaluated the evidence’ between pages 11-20, 62-74 and 77-111 of the judgement and was satisfied that despite the misdirection, there was adequate evidence to convict the Applicant of murder.
29. It should be noted here that it is for the courts of State Parties and not for the Commission to evaluate the facts in a particular case and unless it is shown that the courts’ evaluation of the facts were manifestly arbitrary or amounted to a denial of justice, the Commission cannot substitute the decision of the courts with that of its own. It has not been shown that the courts evaluation of the evidence was in any way arbitrary or erroneous as to result in a failure of justice. The Commission therefore finds that there is no basis for finding that the State Party violated its obligations under Articles 4 and 7 (1).

¹¹ Page 114, paragraph 11.238.

¹² See also *Hoang v France* (1992) 16 EHRR 53.

¹³ 1970, UGA Huele, Belgium

¹⁴ Digest of Case-Law Relating to the European Convention on Human Rights 1955-1967 U.G.A Huele, Belgium paragraph 153 on page 140

Alleged Violation of Article 5

30. The second issue relates to the allegation that the sentence of death in this case was a disproportionate penalty in the circumstances of this case and hence a violation of Article 5 of the Charter.
31. While it is accepted that the death penalty should be imposed after full consideration of not only the circumstances of the individual offence but also the circumstances of the individual offender, (Inter-American Commission of Human Rights in *Downer and Tracey v. Jamaica* (41/2000) 14 April 2000), there is no rule of international law which prescribes the circumstances under which the death penalty may be imposed. It should be pointed out here that apart from stating the trend in other jurisdictions and decisions of other Human Rights bodies governed by specific statutes, it has not been established that the courts in this case did not consider the full circumstances before imposing the death penalty. If anything, the courts fully considered all the circumstances in this case (See pages 48 to 55 of the judgement of the Court of Appeal). It is clear that the submission that the imposition of the death penalty was disproportionate to the gravity of the crime in this case is based on an erroneous assumption of what amounts to extenuating circumstances.
32. Extenuating circumstances are facts bearing on the commission of the crime, which reduce the moral blameworthiness of the accused as distinct from his/her legal culpability. First, the facts or circumstances must be directly related to or connected with the criminal conduct in question. The court is only concerned with facts which lessen the seriousness or culpability of that particular criminal conduct.
33. Second, extenuation relates to moral blameworthiness. It is the state of mind of the offender at the time of the commission of the offence that is a relevant consideration otherwise offenders would use any personal circumstance totally unrelated to the conduct complained of to escape punishment.
34. In considering whether or not extenuating circumstances exist, the inquiry is:
 - a) Whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation
 - b) Whether such facts or circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what s/he did; and
 - c) Whether this influence was of such a nature as to reduce what he did.
35. The claimed capacity for redemption or reformation and or good character is certainly not connected with the commission of the particular murder and therefore not relevant considerations to this finding of extenuating circumstances.
36. In deciding on the proportionality of a sentence one would have to fully weigh the seriousness of the offence against the sentence. It is quite evident from the Court of Appeal records that the murder committed by Mrs Bosch involved considerable effort and careful planning.
37. Thus while the African Commission acknowledges that the seriousness or gruesome nature of an offence does not necessarily exclude the possibility of extenuation, it

cannot be disputed that the nature of the offence cannot be disregarded when determining the extenuating circumstances. As such, the African Commission finds no basis for faulting the findings of both the trial court and Court of Appeal as it relates to this issue.

Issue of reasonable notice

38. It was submitted that failure to give reasonable notice of the date and time of execution amounts to cruel, inhuman and degrading punishment and treatment in breach of Article 5 of the African Charter and that execution under such circumstances violates the protection of law provisions under Article 3 as it deprives an individual the right to consult a lawyer and obtain such relief from the courts as may be open to him or her.
39. It should be noted that this issue was not addressed by the Respondent State in its written submissions primarily because it had not been communicated to it. The issue was not even raised in the Authors' consolidated submissions of the record of their oral submissions on admissibility made at the 30th Session and submitted to the African Commission's Secretariat on 18th March 2002.
40. The issue only surfaced with the Author's written submissions distributed shortly before the hearing of the matter at the 31st Session of the African Commission. It was therefore not surprising that no useful submissions or submissions at all were made on behalf of the Respondent State on the issue. Neither was there any debate on the issue at the instance of the Commissioners, as they had not had an opportunity to consider those submissions.
41. In the circumstances it would be fundamentally unfair to the Respondent State to deal with the substance of this issue save to observe that a justice system must have a human face in matters of execution of death sentences by affording a condemned person an opportunity to "arrange his affairs, to be visited by members of his intimate family before he dies, and to receive spiritual advice and comfort to enable him to compose himself as best he can, to face his ultimate ordeal"¹⁵.

Alleged violation of Article 4: Clemency Procedure was unfair

42. This is one of the two issues raised rather belatedly and the approach in issue 3 above applies and the comments made hereunder are for future guidance in matters of this nature it being pointed out that the communication procedure is an attempt to achieve or address failed justice at the domestic level which follows the rules of natural justice and would not permit any springing of surprises.
43. Applicant alleges that in exercising his clemency, the President acts "arbitrarily". The main issue is whether or not the Presidential clemency is what is envisaged in Article 4 of the Charter. Article 4 proscribes the arbitrary deprivation of the right to life. A process is put in all jurisdiction to ensure that due process is had in ensuring that the right to life is not violated. This process includes the holding of a trial so that an accused is given an opportunity to defend his cause. It is that process that can be challenged to be arbitrary. The intervention of the President does not in any way affect the non-arbitrariness of the process. The due process in Botswana was

¹⁵ Guerra v Baptiste [1996] AC 397 at P.418

followed with the Applicant's case following the process that has been established to guarantee Applicant's rights. Her matter was heard in both the High Court and the Appeal Court.

44. It should also be noted that the exercise of clemency unlike the process described above, is discretionary in most jurisdictions and are for the most part discretionary; they are given to him to be exercised in his own judgement and discretion¹⁶. Whilst the Constitution of Botswana provides for the constitution of an Advisory Committee on Prerogative of Mercy, the President is only required to request and get advice from that committee if he so wishes. However, he can only exercise his power of clemency after presentation of a written report of the case from the trial judge together with any other information that he may require.

45. The question then is whether or not the President arbitrarily deprived the Applicant of her right to life. The word "arbitrarily" is defined in Black's Dictionary¹⁷

"as fixed or done capriciously or at pleasure, without adequate determining principle, not founded, not done or acting according to reason or judgement, depending on the will alone, absolute in power, capriciously tyrannical, despotic, without fair solid and substantial cause, that is without cause based on law.....Ordinarily "arbitrary" is synonymous with bad faith or failure to exercise honest judgement and an arbitrary act would be one performed without adequate determination of principle and one not founded in nature of things..."

A similar definition is provided in Stround's Judicial Dictionary¹⁸ and Classen's Dictionary of Legal Words and Phrases¹⁹

46. The other factor that needs to be considered is the time factor. On 30 January 2001, the court of Appeal dismissed the Applicant's case. On 5 February 2001 a memo from the Gaborone Women's Prison to the divisional Commander states that applicant was advised of her right to petition the President. On 7 February 2001 the Attorney General of Botswana wrote to the Applicant's Lawyers on the issue. The Lawyers wrote to the Clemency Committee on 26 February 2001 requesting for more time to prepare a clemency petition. The preliminary submissions were only submitted on 15 March 2001, one and half months after the Appeal was dismissed. It is acknowledged that on 6 March the lawyers wrote to the President requesting for information as to when the clemency hearing was to be held. Attendance of the Applicant or her lawyers at the hearing is clearly impractical. One can envisage the President now sitting as a court to hear oral submissions from petitioners. Not only is the suggestion misconceived and implications thereof impractical, but the implications will also result in undermining the office and dignity of the President.

47. In any event, the right to be heard does not entail entitlement to the benefit of all the facilities which are allowed to a litigant in a judicial trial. Thus the 'right to be heard' in appropriate circumstances may be confined to the submission of written representations. These are clearly appropriate circumstances for written representations.

¹⁶ Executive independence and the Courts Presidentialism in commonwealth Africa B.O Nwabueze at Page 33

¹⁷ 5th Ed, West Publishing Company, 1979.

¹⁸ 5th Sweet and Maxwell Limited, 1986

¹⁹ Volume 1. Butterworths, 1975.

48. However, it should be noted that a person must be given a reasonable time in which to assemble the relevant information and to prepare and put forward his representations (See also Baxter op cit at p 552.)

Alleged Violation of Articles 1, 4 and 7(1): Execution of Applicant pending consideration of Applicant's Communication by the African Commission

49. The last argument is that Article 1 of the African Charter obliges a State Party to comply with the requests of the African Commission. The Complainants base this argument on the letter written by the Chairperson of the African Commission to the President of Botswana on 27th March 2001 seeking a stay of execution. The letter was communicated by fax.

50. In its oral submissions during the 31st Ordinary Session, the Respondent State argued that the fax was never received by the President. However, in this particular case, the African Commission is not in possession of any proof that the fax was indeed received by the President of Botswana.

51. Article 1 obliges State Parties to observe the rights in the African Charter and to 'adopt legislative or other measures to give effect to them.' The only instance that a State Party can be said to have violated Article 1 is where the State does not enact the necessary legislative enactment²⁰.

52. However, it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty. This is illustrated by the UN General Assembly's adoption of the 2nd Optional Protocol to the ICCPR and the general reluctance by those States that have retained capital punishment on their Statute books to exercise it in practice. The African Commission has also encouraged this trend by adopting a "*Resolution Urging States to envisage a Moratorium on the Death Penalty*²¹" and therefore encourages all States party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty.

For the above reasons, the African Commission,

Finds that the Republic of Botswana is not in violation of Articles 1, 4, 5 and 7(1) of the African Charter on Human and Peoples' Rights;²²

Strongly urges the Republic of Botswana to take all measures to comply with the Resolution urging States to envisage a Moratorium on the Death Penalty;

Requests the Republic of Botswana to report back to the African Commission when it submits its report in terms of Article 62 of the African Charter on measures taken to comply with this recommendation.

*Done at the 34th Ordinary Session held in Banjul, The Gambia
from 6th to 20th November 2003*

²⁰ See the Case of Young, James and Webster which discusses Article 1 of the European convention which is similar to Article 1 of the Charter

²¹ Adopted at the 26th Ordinary Session of the African Commission held from 1st to 15th November 1999, Kigali, Rwanda

²² Commissioner N Barney Pitso asked to be recused from participating in consideration of this communication at the 29th Ordinary Session of the African Commission and as such did not take part in all discussions relating to this matter

242/2001 – Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme*/Islamic Republic of Mauritania

Rapporteur:

- 30th Session: Commissioner Rezag Bara
- 31st Session: Commissioner Rezag Bara
- 32nd Session: Commissioner Rezag Bara
- 33rd Session: Commissioner Rezag Bara
- 34th Session: Commissioner Rezag Bara
- 35th Session: Commissioner Rezag Bara

Summary of facts

1. The complaint was submitted by Interights, Institute for Human Rights and Development in Africa, and *Association Mauritanienne des Droits de l'Homme* (Mauritanian Human Rights Association), on behalf of Mr. Ahmed Ould Daddah, Secretary General of *Union des Forces Démocratiques-Ere nouvelle* (UFD/EN, Union of Democratic Forces-New Era), a Mauritanian political party, which was established on 2 October 1991.
2. The Complainants, mandated by Mr. Ahmed Ould Daddah, allege the following facts. By Decree No. 2000/116.PM/MIPT, dated 28 October 2000, *Union des Forces Démocratiques/Ere nouvelle* (UFD/EN), the main opposition party in Mauritania, led by Mr. Ahmed Ould Daddah was dissolved by the Prime Minister of the Islamic Republic of Mauritania, Mr. Cheick El Avia Mohamed Khouna.
3. This measure, taken pursuant to Mauritanian law, (in particular articles 11 and 18 of the Mauritanian Constitution, and Ordinance No. 91.024 of 25 July 1991 which deals with political parties in articles 4, 25 and 26), was imposed, according to this senior official, following a series of actions and undertakings committed by the leaders of this political organisation, and which:
 - were damaging to the good image and interests of the country;
 - incited Mauritians to violence and intolerance; and
 - led to demonstrations which compromised public order, peace and security.
4. On account of this, all the movable and immovable assets of the said political organisation were, *ipso jure*, seized.
5. A few weeks after the proscription of UFD/EN, the Mauritanian authorities arrested several leaders of the party who had participated in a demonstration against the measure, which they considered illegal and illegitimate, for breach of public order.
6. The Secretary General of the party, Mr Ould Daddah, on arrival from a journey abroad, was himself arrested on 9 December 2000, at Nouakchott airport, and was only released a few days later.
7. On 25 December 2000, the leaders of UFD/EN filed a motion for the repeal of the government's measure before the Administrative Chamber of the Supreme Court, citing:
 - Lack of a just cause for the dissolution Decree;

- The unjustified nature of the punishment of a political party due to the alleged machinations of its leaders;
 - Lack of competence on the part of the authority by whom the Decree was signed; and
 - Absence of any deliberation by the Council of Ministers on the matter of the dissolution, as foreseen by law.
8. On 14 January 2001, the Administrative Chamber of the Supreme Court, ruling as court of original and final jurisdiction, delivered its verdict (No. 01/2001 UFD/EN vs/ Prime Minister and Minister of Interior, Post and Telecommunications of 14 January 2001), throwing out Mr. Ahmed Ould Daddah's appeal, without really giving the grounds, stating that the claim lacked merit.
 9. Since then, the principal leaders and activists of UFD/EN, who did not have the recourse of appealing the Supreme Court's judgement before any other Mauritanian court, have been subjected to a veritable witch-hunt, throughout the Mauritanian territory, and have suffered acts of intimidation and harassment by the security services.
 10. They have also been excluded from participating, under the banner of their political organisation, in the various elections that have been organised in the country.

Complaint

11. The Complainant claims that there has been a violation of the following provisions of the African Charter on Human and Peoples' Rights: **Articles 1, 2, 7, 9(2), 10(1), 13 and 14.**

Procedure

12. The communication was submitted on the 25th April 2001, during the 29th Ordinary Session, held in Tripoli from 23 April to 7 May 2001.
13. The Secretariat acknowledged receipt of the communication on 2 May 2001.
14. At the 30th ordinary session, the African Commission considered the communication and decided to be seized of the case. Consideration of its merits was deferred until the next session and the Commission asked that the parties be informed accordingly.
15. The Secretariat informed the Respondent State of the decision of the Commission in its Note Verbale of 15th November 2001 and the Complainant was informed of the same decision in an official letter dated 19th November 2001.
16. On 22nd January 2002, the Secretariat received the observations on the admissibility and merits of the case from the Respondent State. Those observations were forwarded to the Complainant.

17. The following documents in Arabic were attached to the observations of the Respondent State:
- *Petition dated 27/01/2001 of Mr Mohamed Oula Gouj requesting the review of the decision of the supreme court No. 01/2002 of 14/01/2001;*
 - *Letter of the Assistant Secretary General of UDF/EN dated 24/01/2001;*
 - *Letter of Mr Mohamed O. Gouj cancelling his petition of 27/01/2001;*
 - *Statement of no appeal issued by the Registrar of the Supreme Court dated 12/01/2001*
 - *Communiqué of UDF/EN to development partners;*
 - *Statement of general policy of UDF/EN.*
18. On 25 March 2002, the Complainants, comprising of Interights, *l'Association Mauritanienne des Droits de l'Homme* and *l'Institut pour les Droits Humains et le Développement*, presented the Secretariat of the Commission with their written observations on the admissibility of the complaint, in reply to the arguments on admissibility of the complaint as advanced by the Respondent State.
19. At its 31st Session, held from 2 - 16 May 2002 in Pretoria, South Africa, the African Commission declared the communication admissible and called on both parties to submit their observations on the merits of the case without undue delay.
20. By letter dated 29 May 2002, the Secretariat of the Commission informed both of the concerned parties of the Commission's decision.
21. On 7 August 2002, the Secretariat of the Commission acknowledged receipt of the written observations on the merits of the communication, received on 5 August 2002 from the Complainant. A copy of these observations was forwarded to the Respondent State.
22. At its 33rd ordinary session held in Niamey, Niger, the African Commission listened to the oral remarks of both parties and decided to defer its decision on the merits to the 34th ordinary session. The parties concerned were notified of the decision on 4th July 2003.
23. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the African Commission considered this communication and decided to deliver its decision on the merits.

LAW

Admissibility

24. Article 56 of the African Charter on Human and Peoples' Rights sets out seven conditions, which, under normal circumstances, must be fulfilled for a communication to be admissible. Out of the seven conditions, the government raised the issue regarding the exhaustion of local remedies as provided under Article 56(5) of the Charter, which stipulates -:
- "Communications.... to be considered, are sent after exhausting local remedies, if any unless it is obvious this procedure is unduly prolonged".*
25. In its submission of 7th January 2002, the Respondent State requested that the African Commission: "...enquire whether the complainants had duly seized the

African Commission...”. The Respondent State also informed the African Commission that the rulings of the Administrative Chamber of the Supreme Court could not be appealed against. It however went on to say: “ appeal is not the only legal remedy in Mauritanian law. The rulings made by this jurisdiction are often required for revision on the basis of Article 197 and in accordance with the Civil Commercial and Administrative Procedure Code (CPCCA). Practically, the respondent state affirmed that applications for revision have recently culminated into rulings of withdrawal by the same Chamber.

26. To support its line of reasoning, the respondent state indicated that one of the lawyers of UDF/EN, Lawyer Mohamed Ould Gowf made a plea in the same vein on 27/01/2001 but withdrew it the same day. Based on the above facts and on Article 56(5) of the African Charter, the Respondent state requested that the communication be declared inadmissible due to the fact that the local remedies were not exhausted.
27. However, the fact remains that the generally accepted meaning of local remedies, which must be exhausted prior to any communication/complaint procedure before the African Commission, are the ordinary remedies of common law that exist in jurisdictions and normally accessible to people seeking justice.
28. However, it is a known fact that the revision procedure is an extraordinary legal remedy that exists only if a number of conditions specifically stipulated by the law are fulfilled. In this regard, Articles 197 and 198 CPCCA of the Republic of Mauritania do not allow access to revision unless it is proven that the legal decision taken was wrong or due to the fact that the other party is in possession of decisive evidence.
29. Furthermore, the fact that one of the lawyers of the complainants who was probably not empowered to do so, had indeed applied for a revision and withdrew it the same day, was a clear indication of the complainant’s intention not to resort to such a remedy. In fact, this does not affect at all the exceptionally legal nature of such a legal remedy as outlined above.
30. Consequently, it is a fact that the party that seized the African Commission had indeed exhausted, with regard to this particular case, the entire local remedies of common law that exist and can be resorted to before Mauritanian jurisdictions.
31. In view of the above-stated reasons, the African Commission declared the communication admissible.

Merits

32. The communication relative to the dissolution of the Mauritanian Political Party UFD/Ere nouvelle in accordance with established and legally confirmed regulations is attacked by the Complainant before the African Commission for being in violation of Articles 1, 2, 9(2), 10(1), 13 and 14 of the African Charter, on the basis of the following points:
 - The non-conformity of the legal ruling ratifying the dissolution on the principles governing the right to a fair hearing;
 - The criticism levelled against the legality of the decision for dissolution in accordance with established regulations and illegal and unjustified lapses blamed on the political party UFD/Ere nouvelle.

On the principles governing the right to a fair trial

33. The Complainant contends that the Mauritanian Courts are in violation of the provisions of Article 7 (a) of the African Charter which stipulates:
« Every individual shall have the right to have his cause heard. This comprises the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force. »
34. The Complainant alleges that the dissolution of the main Mauritanian opposition Party UFD/EN, the seizing of its assets and the conditions in which the measure has been confirmed by the highest Court in the land have violated the relevant provisions of the African Charter and other Conventions to which the country is signatory.
35. The Complainant contends that these violations are both procedural and substantial. Procedural, because the basic rules and principles of a fair hearing were not respected during the hearing. Substantial, because the dissolution of the UFD/EN party violated the right of association and freedom of expression of the members and leaders of this political party and violated the principles of democracy outlined in the African Charter.
36. The Complainant alleges that the procedure before the administrative chamber of the Supreme Court did not respect the principles relative to the right to a fair hearing in particular that which is relative to two-tier proceedings. The Complainant also alleges that from the investigation of the case up to the public hearing which decided the on destiny of the UFD/EN, the principles of inter parties had not been respected and that the final ruling by the Judge did not contain pertinent legal arguments justifying the dissolution of the said party.
37. The Respondent State emphasises that the judicial examples and arguments and all the documentation on the right to a fair hearing raised by the Complainant are only applicable in a penal case. The Respondent State imagines evidently that the accusations levelled against the UFD/EN may well have a penal qualification according to the law governing the activities of Political Parties, but this is not enough to give this case a penal character since no penal lawsuit had been brought against the leaders of the said Party.
38. The Respondent State indicates that concerning the respect for the principle of two-tier proceedings, which consists of bringing the entire dossier of the merits of a case before a differently composed higher legal authority for examination, it is established that it concerns a broad based rule which can be widely applied, notably in penal cases. This principle forms the basis of proper administration of justice and allows the well-intentioned applicant to obtain the guarantee of a correct application of the Law.
39. The fact remains however that, as stipulated by Article 7 (a) of the African Charter, every individual has the right to have his cause heard, which includes: "...The right to appeal to competent national organs..."
40. In this particular case, and in conformity with Article 26 of the Decree 91-024 of the 25th July 1991 governing the activities of political parties, the Respondent State

underscores the fact that the competent legal authority to examine the legality and validity of a Decree passed by the Prime Minister of the Islamic Republic of Mauritania is the Administrative Chamber of the Supreme Court, according to the procedure in force in this country. However, the Supreme Court is the highest authority in the Mauritanian legal system and in the matter of appeal against decisions taken by the administrative authorities; the existing procedure requires that annulment takes place only as a first and last resort.

41. Finally, it means that the Mauritanian legislator, like other similar legislations, has given exclusive authority to the highest legal body in the country due to the legal and Political importance of the matter relative to the dissolution of a Political Party. It is before this high authority that the entire Mauritanian legislative system is built and it is here that the uniform rules for applying the Law in this country, in all fields, are established.
42. Concerning the respect for the principle of judgement after due hearing, the Respondent State maintains that the Complainant never mentioned in his written submissions, any opposition to or complaint against the holding of audiences, or of the quality of the representation and the defense of the political party which was dissolved before the Mauritanian legal authorities.
43. After having studied the comments made by the Complainant and the Respondent State, it is well established that the representatives of the UFD/Ere nouvelle received, in good time, all the notifications of the actions and documents relating to this litigation, and had had access to the entire dossier of the case to study all the points and make the relevant criticisms both in writing and by oral advocacy before the competent legal authority.
44. However, regarding this particular case, the parties before the Mauritanian administrative court are, on the one hand, the Minister of the Interior, representing the government and, on the other hand, the political party UFD/Ere nouvelle. As for the Government Commissioner, he carries out the functions of the representative of the Department of Public Prosecution i.e. representative of the public interest charged to ensure, on behalf of society, the sound application of the laws. In this regard, he can resort to methods of public nature that might not have been resorted to by the parties which might have escaped the vigilance of the reporting judge.
45. Thus, the criticism levelled against the Government Commissioner, who is the representative of the Department of Public Prosecution, before the Administrative Division of the Supreme Court because of its so called “collusion” with the ruling, seemed to lack merit due to the absence of hard facts and concrete material evidence to back such a value judgment.
46. In seeking to know if the decision of the Mauritanian Highest Court had been sufficiently justified or not, the report on the ruling by the Administrative Chamber of the Mauritanian Supreme Court amply covers all the arguments raised by the Complainant’s Defense, as much in their written submissions as in their oral address before the audience and provides responses based on the provisions of the Mauritanian Laws. From that moment it is not possible to support this grievance with regard to the aforementioned decision.

47. In this context, the African Commission does not admit the violation of the provisions of Article 7 (1a) of the African Charter for it considers that Mr. Ahmed Ould Daddah's case has been adequately heard by the Administrative Chamber.

On the legality of the Act governing dissolution and the illegal and unjustified lapses blamed on the political party UFD/Ere nouvelle.

48. Article 9 (2) of the African Charter stipulates: *“every individual shall have the right to express and disseminate his opinions within the law”*.

- Article 10 (1) of the African Charter stipulates: *« every individual shall have the right to free association provided that he abides by the law”*; and

- Article 13 (1) of the Charter indicates: *“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”*.

49. The Complainant alleges that by a Decree No. 2000/116/PM/MITP dated 28th October 2000 and signed by the Prime Minister, the Mauritanian Government dissolved the Democratic Forces Union/Ere nouvelle (UFD/EN), the main opposition Party in the country. The same day, Mr. Ahmed Ould Daddah, Secretary General of the said Political Party received, by letter (No. 58/2000) from the Minister of the Interior, Posts and Telecommunications of even date, notification of the measure that the Political group's buildings and assets have been impounded.

50. According to the Decree governing the dissolution, the measure had been taken in application of the provisions of the Constitution of the 20th July 1991 (Articles 11 and 18) and the Decree No. 91 024 of the 25th July 1991 (Articles 4, 25 and 26) which formally prohibited Political Parties from destroying the country's important image and interests, from inciting intolerance and violence and from organising demonstrations that are likely to compromise public order, peace and security.

51. The Complainant contends that the acts by the leaders of the Political Parties mentioned in Articles 4 & 5 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties and liable to lead to the dissolution of their organisation (inciting intolerance and violence, organising demonstrations likely to compromise public order, peace and security, setting up of military or paramilitary organisations, armed militia or combat groups) are already considered by Articles 83 and others of the Mauritanian Criminal Code as offences or punishable crimes.

52. The Complainant points out that the dissolution of the UFD/EN is justifiable by the inflammatory nature of a certain number of documents and expressions attributed to its leaders. In other words, it is the abuse of the freedom of expression by the leaders of this party which gave rise to its expulsion from the Mauritanian Political arena. The Complainant specifies that such assertions are unacceptable in a State which is said to base its activities on the principles of Democracy and on the principles of the African Charter. Indeed, there had been, not only prejudice to the freedom of expression, to the right of association and to the right of the leaders of the UFD/EN to participate in the management of public affairs in Mauritania, but also to the fundamental rights of the said Party which, through this measure, has lost all its assets.

53. The Complainant indicates that the notions of the right of association and of the freedom of expression are complementary in a democratic State, in the sense that the Association or the Political Party is, the means par excellence, for the freedom of expression. It is well known that Political Parties contribute greatly to the political debate of democratic States, notably through elections which are organised periodically to guarantee the freedom of choice of its leaders by the citizens.
54. In paying special attention to the terms used in the Party's declarations, in the statements of its leaders and indeed to the context in which these had been published or delivered, the Complainant voices his surprise to note that the authors of this measure were unaware that the activities for which the UFD/EN was being blamed had taken place in the context of « training and the expression of the political will of its members » and in the context of Mauritians enjoying their right to be differently informed about the political, economic and social situation of their country.
55. The Complainant alleges that the contentious statements and publications had been made and/or distributed during a time when Mauritania was making pre-campaign preparations for the legislative and local elections for the year 2001. In such a context, each Party was endeavouring, with due respect for democratic rules, to put its opponent in a position of weakness before the voters during the electoral campaign.
56. The Complainant exposes that it is for this reason that the statement of the 17th September 1998 had been drafted following the dissemination, by several reliable sources, of information relating to the discovery of a case of misappropriation of public funds, particularly of the aid received from development partners, of financial chaos and of the mismanagement of public affairs²³.
57. According to the Complainant, the objective of this document was, among other things, to remind Mauritania's partners that the Mauritanian citizen, in view of the total silence of the authorities on this issue « has the right and the duty to ask for explanations and to know what happened to the money obtained in his name and which should be refunded »²⁴, that a happy outcome of this crisis which is threatening the existence of Mauritania, since more than 57% of the population lived below the poverty threshold, could only be obtained through « responsible, dispassionate and constructive dialogue the only means to realise consensual solutions to the major problems which exist ». The document also insisted on the need for the country to have a pluralist Parliament resulting from transparent elections, an independent judiciary, a really free press, the opening of the public media for opposition debates and to give free access to airtime. And in conclusion, the authors of the statement affirmed that « the UFD/EN, as a political force of major significance, whilst expressing its sincere gratitude to all of Mauritania's development partners for their large contributions to this country, and in expressing the hope to see this assistance

²³ The Complainant refers particularly to the Article which appeared in the French Daily *Le Monde*, which is generally well informed and which was intitled « Mauritania plagued by affairism and a return to tribalism » and in which could be read the following « the word deprivation is not strong enough (to describe the situation of the Mauritanian) and that to remain afloat the only solution available for the Administration is to divert for its own benefit, part of the monies given by the international community to finance development projects »

²⁴ Cf. Declaration made for the attention of Mauritania's development partners, page 2

increased, invites them to avoid, as much as possible, easy solutions and complacent attitudes which is costing Mauritania enormously for the past several years »²⁵.

58. Concerning the statement of the 30th October 1999 made by the UFD/EN, the Complainant argues that it had been published at the end of the Party's 2nd Ordinary Congress which had brought together some fifteen African Political Parties. The text, a report of the 3-day meeting of the Party, had been divided in two sections, devoted respectively to the political, economic and social situation of the nation and to the Party's internal activities.
59. The Complainant claims that the first part of the document was a presentation of the major facts of life in the nation which had been examined by the participants at the Congress and ideas and solutions, outlined in the resolutions which had been advocated by the Party as definitive solutions. These were obviously problems which the Authorities did not wish and still do not wish to see exposed to the public view, such as: - the threats to national unity brought about by racist, slavlike, tribalistic and regionalistic practices ; the maintenance of repressive texts which legalise the muzzling of the press, the violation of individual and collective freedoms and the regular and shameless rigging of elections ; the economic bankruptcy resulting from the systematic looting of national resources and the diverting of national aid by the ruling clique, giving rise to the aggravation of social inequality, of unemployment, of impoverishment and the abandonment by the State of its essential functions of regulation, health, education and security ; - the diplomatic isolation of Mauritania from its natural arabo-african environment and its most spectacular action which was the elevation of Israel's diplomatic representation to the rank of Ambassador.
60. The Complainant notes that in these two documents, there is no passage that contains an insulting or outrageous word against the Authorities or advocating violence and/or calling on the populations to rise against the leaders of the country. And in the two cases, the Party was acting as an activist in the national political life and playing its natural and important role in drawing public attention to the facts outlined by the information disseminated by independent organisations, and all of this with due respect for the laws and regulations of the country, argues the Complainant.
61. The Complainant party recalls that in a democratic society, « the Authorities should tolerate criticism even where it can be considered as insulting or provocative²⁶ » and one of the characteristics of democracy is « to allow the proposal and the discussion of diverse political projects even those which challenge the State's current mode of organising, so long as these do not cause prejudice to democracy itself²⁷ », this is what the Mauritanian Constitution requires in its Article 11.
62. As for the incriminating speech, the Complainant continues, it had been delivered by Mr. Ahmed Ould Daddah in his capacity as Secretary General of the UFD/EN during one of the rare occasions when the Party had obtained approval to hold a rally. The essence of his speech related, that day, to the respect which should be accorded by the Mauritanian Authorities to the main Opposition Party of the country

²⁵ Cf. Declaration quoted above, page 2.

²⁶ Cf. Cr.EDH, Arrest of Ozgur Gundem c. Turkey of the 16th March 2000, paragraph 60

²⁷ Cf. Cr.EDH, Arrest of Ybrahim Askoy c. Turkey of the 10 January 2001, paragraph 78

as its due. In his view, the Party should no longer accept the harassment to which it was being subjected and if it should continue the changes being fervently called for by its militants would not come about in a peaceful manner for the UFD/EN would no longer leave the initiative to the Authorities. He ended his speech by calling on all the members of the Party to prepare for battle in the coming elections. The Complainant alleges that nowhere in the speech was there use of a word to make people think that his Party was, from henceforth, going to resort to violence. That was all the more important considering that at the end of the meeting the thousands of militants dispersed without any incident in spite of an impressive police presence.

63. The Respondent State alleges that political pluralism in the Islamic Republic of Mauritania has its political bases in Articles 11 and 18 of the 1991 Constitution and its legal basis in Articles 4, 25 and 26 of the Law of 25th July 1991 relative to Political Parties.
64. In this context, Article 11 of the Constitution of the Islamic Republic of Mauritania stipulates: « *Political Parties work towards the formation and the expression of political will. They form and exercise their activities freely on condition that they respect the democratic principles and do not jeopardise, either by object or by action, national sovereignty, territorial integrity and the unity of the nation and of the Republic. The Law fixes the conditions for the creation, operation and dissolution of Political Parties.*»
65. Article 18 of the Constitution of the Islamic Republic of Mauritania puts down all offences committed, which are prejudicial to the security of the State.
66. Article 4 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties reads as follows: « *Political Parties are prohibited all propaganda against the principles of Islam. Islam cannot be the exclusive prerogative of any Political Party. In their Statutes, programmes, in their speeches and in their political activities, Political Parties are prohibited from:*
 - *Any form of incitement to intolerance and to violence;*
 - *Organisation of demonstrations likely to compromise public order, peace and security;*
 - *Any transformation aimed at establishing military or paramilitary organisations or armed militia or combat groups;*
 - *Any propaganda with the objective of causing prejudice to territorial integrity or to the unity of the nation »*
67. Article 25 of the Decree No. 91 – 024 of 25th July 1991 relative to Political Parties makes it possible for a Political Party to be dissolved if the latter violates the rules, which govern it.
68. The Respondent States argues that it is on the basis of these two texts that the Political Party UFD/Ere nouvelle received its legal sanctioning and was able to carry out its activities normally. These two texts, one of which has a Constitutional value and the other an organic value, fix the framework for the activities of Political Parties as organs for participation in the democratisation of public life and determine the modalities of the sanctions to be imposed in case of transgression of the Constitutional requirements and the legal rules governing the activities of Political Parties in the Islamic Republic of Mauritania.
69. Pertaining to the dissolution of the UFD/EN, the Respondent State alleges that the lack of direction and extremism of this Party was such that the dissolution was not

only justified but also necessary in view of the danger that it represented for the State and for social peace.

70. The Respondent State insists that the UFD/EN, because of its radicalism, constituted a grave threat to public order and seriously threatened the rules of the democratic game. In this context it was quite legitimate for the State, in order to avoid a drifting to unforeseeable consequences, to take all the requisite measures to safeguard the general interest of the country and to preserve the social fabric as well as to maintain public order and security in a democratic society, and this in conformity with the relevant provisions of the Decree for the creation and dissolution of Political Parties.
71. The Authorities clearly defined the legal causes and bases of this measure. On the causes relating to the dissolution, the Respondent State noted as follows:
- (1) The activities carried out both inside and outside the country to discredit and destroy the interests of Mauritania. In this regard, the Respondent State cites the communiqué by the UFD/EN dated 17th September 1998 addressed to Mauritania's development partners with the objective of convincing the donor countries to arrest all economic assistance to Mauritania and the orchestrated disinformation campaign against the country relating to the dumping in the national territory of nuclear waste from Israel;
 - (2) The fact that the UFD/EN had advocated violence as an instrument of its political activities. It also mentioned the Party's General Political Statement of the 30th October 1999 certain passages of which, notably those speaking of the marginalisation and ignorance of the rights of black-africans, are seen by the Respondent as trying to re-ignite ethnic and racial upheavals in a pluriethnic country, disturbances against public law and order blamed on this Party and declarations attributed to certain leaders of this Party who are reported to have said that they would no longer organise peaceful demonstrations.
72. With regard to the legality of the measure, the Respondent State affirms that this legality is based in Article 11 of the Constitution which governs the principle of the freedom to set up political parties, on condition that they respect the democratic principles and do not cause prejudice either by objective or by their actions to national sovereignty, to the territorial integrity, to the unity of the Nation of the Republic and Articles 4, 25 and 26 of Decree 91-024 of the 25th July 1991 relative to Political Parties which prohibits any action that may incite intolerance and violence and any effort to organise demonstrations that may compromise public order, peace and security.
73. The Respondent State reiterates that factual evidence existed whereby the UFD/EN was advocating violence, was carrying out subversive activities which were prejudicial to national unity, was training dangerous hooligans who were likely to jeopardise the lives and property of peaceful citizens.
74. This factual evidence, continues the Respondent State, fully justifies the regulatory measure taken against the UFD/EN decided by the Council of Ministers since the threat against order, peace and security was evident.

75. The Respondent State advances several arguments against the authors of the communication to justify the basis of the decision to dissolve the UFD/EN, in particular:
- The fact that the activities of and positions taken by the leaders of this Party constituted a threat to the fundamental interests and image of the country;
 - The fact that certain actions and declarations by the Party appear to be meant to incite Mauritians to intolerance and violence;
 - The fact that some of its members were involved in activities geared towards pushing people to disobedience and disorder thereby endangering public peace and security.
76. According to the interpretation given by the African Commission to freedom of expression and to the right of association as defined in the African Charter, States have the right to regulate, through their national legislation, the exercise of these two rights. Articles 9(2), 10(1) and 13(1) of the African Charter all specifically refer to the need to respect the provisions of national legislation in the implementation and enjoyment of such rights. In this particular case, the relevant provisions of Mauritanian laws that had been applied are articles 11 and 18 of the Constitution and articles 4, 25 and 26 of the Decree 91-024 of the 25th July 1991 relative to Political Parties.
77. However these regulations should be compatible with the obligations of States as outlined in the African Charter²⁸. In the specific case of the freedom of expression that the African Commission considers as « a fundamental human right, essential for the development of the individual, for his political awareness and his participation in public affairs²⁹, a recent decision³⁰ clearly delineated that the right of States to restrain, through national legislation, the expression of opinions did not mean that national legislation could push aside entirely the right to expression and the right to express one's opinion. This, in the Commission's view, would make the protection of this right inoperable. To allow national legislation to take precedence over the Charter would result in wiping out the importance and impact of the rights and freedoms provided for under the Charter. International obligations should always have precedence over national legislation, and any restriction of the rights guaranteed by the Charter should be in conformity with the provisions of the latter.
78. For the African Commission the only legitimate reasons for restricting the rights and freedoms contained in the Charter are those stipulated in Article 27(2), namely that the rights « shall be exercised with due regard to the rights of others, collective security, morality and common interest »³¹. And even in this case the restrictions should « be based on legitimate public interest and the inconvenience caused by these restrictions should be strictly proportional and absolutely necessary for the benefits to be realised »³².
79. Furthermore, the African Commission requires that for a restriction imposed by the legislators to conform to the provisions of the African Charter, it should be done

²⁸Cf. Resolution on the right to freedom of association, paragraph 3

²⁹ Communication 212/98 Amnesty c/Zambia paragraph 54

³⁰ Communication 105/93, 128/94, 130/94 and 152/96 Media Rights Agenda and Constitutional Rights Project v/Nigeria paragraph 66

³¹ Ibid, paragraph 68

³² Ibid, paragraph 69

« with respect for the rights of others, collective security and common interest³³ » that it should be based « on a legitimate public interest ...and should be strictly proportional and absolutely necessary » to the sought after objective³⁴. And more over, the law in question should be in conformity with the obligations to which the State has subscribed in ratifying the African Charter³⁵ and should not « render the right itself an illusion³⁶ ».

80. It is worthy of note that the freedom of expression and the right to association are closely linked because the protection of opinions and the right to express them freely constitute one of the objectives of the right of association. And this amalgamation of the two norms is even clearer in the case of political parties, considering their essential role for the maintenance of pluralism and the proper functioning of democracy. A political group should therefore not be hounded for the simple reason of wanting to hold public debates, with due respect for democratic rules, on a certain number of issues of national interest.
81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the Party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian Government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.
82. Nonetheless, and without wanting to pre-empt the judgement of the Mauritanian Authorities, it appears to the African Commission that the said Authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this Party. It would appear in fact that that if the Respondent State wished to end the verbal « drifting » of the UFD/EN Party and to avoid the repetition by this same Party of its behaviour prohibited by the law, the Respondent State could have used a large number of measures enabling it, since the first escapade of this Political Party, to contain this « grave threat to public order ».
83. The Decree No. 91-024 had in effect, made provision for other sanctions in order to deal with « slips » of Political Parties. Furthermore, the African Commission finds that the dissolution of UFD/EN was in conformity with the provisions of the Decree relating to the Political Parties.
84. The African Commission observes that the UFD/EN Party transformed itself legally into UFD/EN retaining its recognised representatives on the basis of its political statement and its programmes of action. The African Commission also calls on all the Republican political forces in the Islamic Republic of Mauritania to work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice which would preserve social unity and public peace.
85. The African Commission notes that the Respondent State contends rightly that the attitudes or declarations of the leaders of the dissolved Party could indeed have violated the rights of individuals, the collective security of the Mauritians and the common interest, but the disputed dissolution measure was “ not strictly

³³ Cf. Communication 140/94 cited above, paragraph 41

³⁴ Cf. Communication 140/94 cited above, paragraph 42.

³⁵ Cf. Communication 147/95 and 149/96 Sir Dawda K. Jawara/The Gambia, paragraph 59.

³⁶ Cf. communication 140/94 cited above, paragraph 42.

proportional” to the nature of the breaches and offences committed by the UFD/EN.

For these reasons, the African Commission-:

Finds that the dissolution of UFD/Ere nouvelle political party by the Respondent State was not proportional to the nature of the breaches and offences committed by the political party and is therefore in violation of the provisions of Article 10(1) of the African Charter.

Rapporteur:

31 st	Session: Commissioner Rezag Bara
32 nd	Session: Commissioner Rezag Bara
33 rd	Session: Commissioner Rezag Bara
34 th	Session: Commissioner Rezag Bara

Summary of Facts

1. The complaint is filed by Dr. Liesbeth Zegveld, an international lawyer at a Netherlands based firm - **Böhler Franken Koppe De Feijter**, and Mr. Mussie Ephrem, an Eritrean living in Sweden.
2. The Complainants allege that 11 (eleven) former Eritrean government officials, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie were illegally arrested in Asmara, Eritrea on 18th and 19th September 2001 in violation of Eritrean laws and the African Charter on Human and Peoples' Rights. They were part of a group of 15 senior officials of the ruling Peoples Front for Democracy and Justice (PFDJ) who had been openly critical of the Eritrean Government policies. In May 2001, they wrote an open letter to ruling party members criticising the government for acting in an "illegal and unconstitutional" manner. Their letter also called upon "all PFDJ members and Eritrean people in general to express their opinion through legal and democratic means and to give their support to the goals and principles they consider just." The government subsequently announced that the 11 individuals mentioned above, on whose behalf the present complaint is being filed, had been detained "because of crimes against the nation's security and sovereignty."
3. The complaint also alleges that the detainees could be prisoners of conscience, detained solely for the peaceful expression of their political opinions. Their whereabouts is currently unknown. The Complainants allege that the detainees may be held in some management building between the capital Asmara and the port of Massawa. They have reportedly not been given access to their families or lawyers. The Complainants fear for the safety of the detainees.
4. The Complainants state that they have made a request for *habeas corpus* to the Minister of Justice of Eritrea. They claim that they could not submit the same to the courts, as the place of detention of the 11 former officials was unknown. They allege that in the *habeas corpus* the Eritrean authorities were asked, among others, to reveal where the 11 detainees were being held, to either charge and bring them to court or promptly release them, to guarantee that none of them would be ill treated and that they have immediate access to lawyers of their choice, their families and adequate medical care. The Complainants allege that no reaction has been received from the Eritrean authorities.
5. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

6. The Complainants allege violations of Articles 2, 6, 7(1), and 9(2) of the African Charter on Human and Peoples' Rights.
7. The Complainants pray that should the detainees be tried, the trial should be held in accordance with international human rights standards and without recourse to the death penalty. They claim that such a trial should not be before the Special Court, which they allege fails to meet international standards of fair trial.

Procedure

8. The complaint was dated 9th April 2002 and received at the Secretariat on 9th April 2002 by fax, and on 9th and 11th April 2002 by email.
9. On 19th April 2002, the Secretariat wrote to the Complainants acknowledging receipt of the complaint, and informing them that their request for provisional measures was noted and would be acted upon accordingly.
10. On 3rd May 2002, the African Commission wrote a letter of appeal to His Excellency Issayas Afewerki, President of the State of Eritrea, respectfully urging Him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the Commission.
11. 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.
12. On 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea responded to the Commission appeal and confirming to the latter that the alleged victims on whose behalf the complaint was filed had their quarters in appropriate government facilities, had not been ill-treated, have had continued access to medical services and that the government was making every effort to bring them before an appropriate court of law as early as possible.
13. On 28th May 2002, the Secretariat wrote to the Complainants and the Respondent State of the Commission's decision to be seized of the matter and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
14. The Secretariat of the African Commission forwarded the Ministry's response to the Chairperson of the African Commission on 7th June 2002 and to the Complainants on 18th June 2002.
15. On 25th October 2002, the African Commission wrote, by way of follow up on its urgent appeal in the matter, to the Respondent State reminding it that it was the responsibility of the Member State's General Prosecutor to bring the accused before a competent court of law in accordance with the rules guaranteeing fair trial under relevant national and international instruments.
16. The two parties made submissions on admissibility.

17. At its 33rd Ordinary Session held from 15th to 29th May 2003, in Niamey, Niger, the African Commission heard oral submissions from both parties to the communication and decided to declare the communication admissible.
18. On 10th June 2003, the Secretariat of the African Commission wrote informing the parties to the communication of the African Commission's decision and requested them to forward their submissions on the merits of the communication within 3 months.
19. The Chairperson of the African Commission forwarded a letter dated 10th June 2003 appealing to H.E the President of Eritrea to intervene in this matter and urge the authorities holding the 11 individuals to release them or bring them before the courts in Eritrea.
20. At its 34th Ordinary Session, held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered the communication and delivered its decision on the merits.

LAW

Admissibility

21. The admissibility of communications brought pursuant to Article 55 of the African Charter is governed by the conditions stipulated in Article 56 of the African Charter. This Article lays down seven (7) conditions, which must generally be fulfilled by a Complainant for a communication to be declared admissible.
22. At issue in the present communication is whether the Complainants have pursued and exhausted the domestic legal remedies of Eritrea, and if not, whether the exception to the exhaustion of domestic remedies rule should apply. This issue of exhaustion of domestic remedies is governed by Article 56(5) of the African Charter and it provides -:
 - Communications ... received by the 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*
23. The rule requiring exhaustion of local remedies has been applied by international adjudicating bodies and 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.
24. In determining whether this communication should be declared admissible or otherwise, the African Commission must have regard to the arguments put forward by the Complainants and the Respondent State.
25. The Complainants submit they have attempted to exhaust local remedies in Eritrea. They state that on 26th November 2001 and on 9th April 2002, they submitted a *habeas corpus* request through the Eritrean Minister of Justice asking the Eritrean Authorities to disclose where the 11 detainees were being held and why. The Complainants also requested that the detainees be brought to court and charged in accordance with the law, however, there was no response to their request. A similar request was made on

26th June 2002 (which is after the African Commission was seized of their complaint) to the Eritrean High Court in Asmara to which there was no reply either.

26. In her oral submissions during the 33rd Ordinary Session of the African Commission, Zegveld stated that in an attempt to access the local courts, they had requested locally based legal practitioners (whom she declined to name) to bring the matter before the local courts. However, the said lawyers later informed her that they would not be able to pursue the detainees' case in the domestic courts for fear of persecution by the authorities and for fear of jeopardising their legal practice.
27. The Complainants further submit that for more than 18 months, the 11 detainees have been held in detention without formal charges and with no access to their lawyers or families thus rendering them unable to seek legal or administrative redress. Furthermore, there has been no response from the government of Eritrea or High Court of Asmara, in relation to the Complainants' requests of 26th November 2001 and 9th April 2002.
28. Under the circumstances presented above, the Complainants aver that the requirement to exhaust local remedies can no longer apply because even where such remedies would have been existent they have been unduly prolonged in this case.
29. The Complainants refer the African Commission to a decision of the European Court of Human Rights in *Ocalan vs Turkey*³⁷ where the court held that Ocalan's isolation and the fact that the Turkish police obstructed his access to lawyers made it impossible for the applicant to have effective recourse to a domestic remedy under Turkish Law.
30. In its written submissions, the Respondent State argues that the Complainants addressed their *habeas corpus* request to the Minister of Justice who is a member of the Executive branch with no capacity to address and take decisions on this matter either in substance or in procedure. They submit that only the judiciary has the authority to take action on any civil, criminal and other issues of judicial nature including, the matter of *habeas corpus*.
31. During the 33rd Ordinary Session, the Representative of the Respondent State submitted that to date the Complainants have not submitted themselves to the courts in Eritrea. He informed the African Commission that he had personally checked with the High Court of Asmara to establish whether the matter had been brought to the court's attention but there was no case file on this matter.
32. The Representative of the Respondent State argues that the Complainants' assertion that they have not been able to access the domestic courts is speculative. He stated that Zegveld should accredit herself to the courts in Eritrea to enable her bring this matter before the local courts.
33. The Respondent State further submits that they have been unable to bring the 11 detainees before a court of law because of the nature of the criminal justice system in Eritrea. The Representative of the Respondent State informed the African Commission that the criminal justice system in Eritrea was inherited from Ethiopia and is therefore lacking. Within the High Court of Asmara, there is only one

³⁷ Application No. 46221/99, 12th March 2003

chamber responsible for handling criminal cases including criminal matters from the lower courts. As such, the Court's calendar is highly congested and difficult to manage. Therefore cases are bound to take time before they are heard by the courts and this is the very reason for the delay in bringing the matter of the 11 detainees before a court of law.

34. There are exceptions to the rule of exhaustion of domestic remedies and the Complainants have argued that they could not exhaust the domestic remedies because the domestic legislation of the Eritrea does not afford due process of law for the protection of the rights that have allegedly been violated.
35. At this stage, it should be made clear that, when a person is being held in detention and accused for committing a crime, the African Commission holds that it is the responsibility of the Member State, through its appropriate judicial bodies, to bring this person promptly before a competent court of law in order to enable him/her to be tried in accordance with rules guaranteeing the right to a fair trial in accordance with national and international standards.
36. The Inter-American Court of Human Rights in the *Velasquez case*³⁸ while interpreting Article 46 of the American Convention (similar to Article 56(5) of the African Charter) which relates to the issue of exhaustion of domestic remedies, stated that, for the rule of prior exhaustion of domestic remedies to be applicable, the domestic remedies of the State concerned must be available, adequate and effective in order to be exhausted. The Court also opined that where a party raises non-exhaustion of local remedies because of the unavailability of due process in the State, the burden of proof will shift to “the State claiming non-exhaustion and it has an obligation to prove that domestic remedies remain to be exhausted and that they are effective.”
37. In *Consolidated communication 147/95 and 149/96*³⁹, the African Commission also ruled that domestic remedies must be available, effective and sufficient; A domestic remedy is considered available if the petitioner can pursue it without impediment, it is effective if it offers a prospect of success and it is sufficient if it is capable of redressing the complaint.
38. The African Commission notes that by its own admission, the Respondent State has indicated that it has not yet put in place structures that would ensure that cases are handled “within reasonable time”. However, the Respondent State goes ahead to assure the African Commission that the detainees will be brought before a court of competent jurisdiction in due course.
39. The State has a constitutional or statutory requirement to provide an accessible, effective and possible remedy whereby alleged victims can seek recognition and restoration of their rights before resorting to the international system for protection of human rights. Such procedures should not be mere formalities that, rather than enable the realisation of those rights, to the contrary, dilute with time any possibility of success with respect to their assertion, recognition or exercise.

³⁸ Velasquez Rodríguez Case, Judgement of July 29, 1988, Inter-Am.Ct.H.R (Ser.C) No.4 (1988)

³⁹ Consolidated communication 147/95 and 149/96 – Sir Dawda K. Jawara/The Gambia

40. Very clearly, the situation as presented by the Respondent State does not afford due process of law for protection of the rights that have been alleged to be violated; the detainees have been denied access to the remedies under domestic law and have thus been prevented from exhausting them. Furthermore, there has been unwarranted delay in bringing these detainees to justice.

41. For these reasons, the African Commission declares this communication admissible.

Ruling by the African Commission on request by the Respondent State to revisit the decision on admissibility

42. The present communication was declared admissible at the 33rd Ordinary Session of the African Commission's held in May 2003. In response to the African Commission's request for written submissions on the merits, the Respondent State in a Note Verbale expressed its dismay at the African Commission's decision to declare the matter admissible. They stated that they found the African Commission's decision on admissibility unacceptable and therefore requested that the African Commission revisits its decision on admissibility.

43. Before dealing with the merits of the communication, the African Commission would like to pronounce itself on the request by the Respondent State to revisit its decision on admissibility.

44. Firstly, it should be noted that the Respondent State did not bring any new element, either on the facts of the case as considered by the African Commission or on the legal grounds upon which he is making such a request.

45. Secondly, Rule 118(2) of the African Commission's Rules of Procedure stipulate that:
If the Commission has declared a communication inadmissible under the Charter, it may reconsider this decision at a later date if it receives a request for reconsideration....

The Rules of Procedure do not make provision for the African Commission to revisit its decision once a communication has been declared admissible. Furthermore, it has been the practice of the African Commission not to reconsider a decision declaring a communication admissible.

For these reasons the African Commission upholds its decision on admissibility in this matter.

Merits

46. The African Commission delivered its decision on admissibility of this communication at its 33rd Ordinary Session and informed the parties of its decision on 10th June 2003. The Secretariat of the African Commission further requested the parties to forward their submissions on the merits of the communication within 3 months. Whereas the Complainants forwarded their written submissions on the merits of the communication, none were received from the Respondent State. It is an established principle of the African Commission that where allegations of violations of provisions of the African Charter go uncontested by the Government concerned, the African Commission must decide on the facts as given. This principle also conforms to the practice of other international human rights adjudicatory bodies. In

the present communication therefore, the African Commission is left with no alternative but to proceed and deliver a decision on the merits based on the submissions of the Complainants.⁴⁰ Although the African Commission has in this decision referred to the oral submissions made by the Respondent State during the 33rd Ordinary Session, especially as they relate to some issues that touch upon the merits of the communication, the Respondent State's failure to present comprehensive submissions on the merits has been done at its own peril.

47. By Note Verbale dated 20th May 2002, the Respondent State informed the African Commission that the 11 persons had indeed been detained for "*conspiring to overthrow the legal government of the country in violation of relevant OAU resolutions, colluding with hostile foreign powers with a view to compromising the sovereignty of the country, undermining Eritrean National Security and endangering Eritrean society and the general welfare of its people*". The Respondent State further stated that such detention was in conformity with the criminal code of the country. In their oral submissions made during the 33rd Ordinary Session in May 2003, the Respondent State further admitted that they had not at the time brought the 11 detainees before any court of law.

48. The Complainants aver that the 11 persons who were former Eritrean Government officials, had been openly critical of the Eritrean government policies and as a direct result of their open letter criticising the government of Eritrea for acting in an illegal and unconstitutional manner, they were arrested and detained for committing "crimes against the nation's security and sovereignty."

49. The Complainants state that the 11 detainees have since September 2001 been held incommunicado and have never been brought before any courts of law in violation of Article 17(4) of the Constitution of the State of Eritrea and Article 6 of the African Charter. Article 17 (4) of the Constitution provides that every person who is held in detention must be brought before a court of law within 48 hours of his arrest and no person shall be held in custody beyond such a period without the authority of the court.

50. The Complainants submit that the abovementioned acts by the Respondent State violate Articles 2, 6 and 7(1) of the African Charter.

51. 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 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"

Article 7(1) of the African Charter provides

Every individual shall have the right to have his cause heard. This comprises

⁴⁰ Communication 74/92 – Commission Nationale des Droits de l'Homme et des Libertés/Chad and 232/99 – John D. Ouko/Kenya

- a) *The right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;*
- b) *The right to be presumed innocent until proved guilty by a competent court or tribunal;*
- c) *The right to defence, including the right to be defended by counsel of his choice;*
- d) *The right to be tried within a reasonable time by an impartial court or tribunal;*

52. Although Article 6 of the African Charter guarantees the right to liberty and security of the person, this is not an absolute right because the African Charter allows the deprivation of this right through lawful means. The African Charter specifically prohibits arbitrary arrests and detention.
53. Evidence before the African Commission indicates that the 11 persons have been held incommunicado and without charge since they were arrested in September 2001. This fact has not been contested by the Respondent State. They are being held in custody and have been cut off from communication with the outside world, with no access to their lawyers or families. Their whereabouts are unknown putting their fate under the exclusive control of the Respondent State.
54. The African Commission on two occasions wrote letters of Appeal to the President of the State of Eritrea informing him about the communication before the African Commission and requested him to intervene in the matter to ensure that the 11 persons are removed from secret detention and brought before the courts of law in Eritrea. In a Note Verbale dated 20th May 2002, the Ministry of Foreign Affairs of the State of Eritrea informed the African Commission that the 11 persons were being held in appropriate government facilities, that they had not been ill-treated and had access to medical services. The Ministry assured the African Commission that the government was making every effort to bring them before an appropriate court of law as early as possible. The African Commission notes that to date it has not received any information or substantiation from the Respondent State demonstrating that the 11 persons were being held in appropriate detention facilities and that they had been produced before courts of law.
55. Incommunicado detention is a gross human rights violation that can lead to other violations such as torture or ill-treatment or interrogation without due process safeguards. Of itself, prolonged incommunicado detention and/or solitary confinement could be held to be a form of cruel, inhuman or degrading punishment and treatment. The African Commission is of the view that all detentions must be subject to basic human rights standards. There should be no secret detentions and States must disclose the fact that someone is being detained as well as the place of detention. Furthermore, every detained person must have prompt access to a lawyer and to their families and their rights with regards to physical and mental health must be protected as well as entitlement to proper conditions of detention⁴¹.
56. The African Commission holds the view that the lawfulness and necessity of holding someone in custody must be determined by a court or other appropriate judicial authority. The decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed. In any event, detention should not continue beyond the period for which the State can provide

⁴¹ Consolidated communication 143/95, 150/96 – Constitutional Rights Project and Civil Liberties Organisation/Nigeria

appropriate justification. Therefore, persons suspected of committing any crime must be promptly charged with legitimate criminal offences and the State should initiate legal proceedings that should comply with fair trial standards as stipulated by the African Commission in its ***Resolution on the Right to Recourse and Fair Trial***⁴² and elaborated upon in its ***Guidelines on the Right to Fair Trial and Legal Assistance in Africa***⁴³

57. In the present communication, the Respondent State did not provide the African Commission with any details regarding the specific laws under which the 11 persons were detained but instead generally states that their detention is in “*consonance with the existing criminal code ...and other relevant national and international instruments*”. The 11 persons were detained on account of their political beliefs and are being held in secret detention without any access to the courts, lawyers or family. Regrettably, these persons’ rights are continually being violated even today, as the Respondent State is still holding them in secret detention in blatant violation of their rights to liberty and recourse to fair trial⁴⁴.
58. The Complainants further allege that the 11 persons were arrested and detained because they expressed opinions that were critical of the Respondent State. The Complainants submit that this amounts to a violation of Article 9 (2) of the African Charter, which provides
- “Every individual shall have the right to express and disseminate his opinions within the law”*
59. The right to freedom of expression has been recognised by the African Commission as a fundamental individual human right which is also a cornerstone of democracy and a means of ensuring the respect for all human rights and freedoms.⁴⁵ Nonetheless, this right carries with it certain duties and responsibilities and it is for this reason that certain restrictions on freedom of expression are allowed. However, Article 9(2) as well as Principle II(2) of the ***Declaration of Principles on Freedom of Expression in Africa*** categorically state that such restrictions have to be *provided for by law*.⁴⁶
60. It is a well settled principle of the African Commission that any laws restricting freedom of expression must conform to international human rights norms and standards relating to freedom of expression⁴⁷ and should not jeopardise the right itself. In fact, the African Charter in contrast to other international human rights does not permit derogation from this or any other right on the basis of emergencies or special circumstances.

⁴² Adopted by the African Commission at its 11th Ordinary Session held from 2nd to 9th March 1992 in Tunis, Tunisia.

⁴³ Adopted by the African Commission at its 33rd Ordinary Session held from 15th to 29th May 2003 in Niamey, Niger.

⁴⁴ Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria; UNHRC Communication 440/1990

⁴⁵ Preamble to the Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission at its 32nd Ordinary Session held from 17th to 23rd October 2003 in Banjul, The Gambia

⁴⁶ **Principle II(2)** of the Declaration of Principles on Freedom of Expression in Africa provides “*any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be necessary and in a democratic society*”

⁴⁷ Consolidated communication 140/94, 141/94, 145/95 – Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda/Nigeria

61. Consequently, if any person expresses or disseminates opinions that are contrary to laws that meet the aforementioned criteria, there should be due process and all affected persons should be allowed to seek redress in a court of law.⁴⁸
62. The facts as presented leave no doubt in the mind of the African Commission that the Respondent State did indeed restrict the 11 persons' right to free expression. No charges have been brought against the 11 persons and neither have they been brought before the courts. Such restrictions not only violate the provisions of the African Charter but are also not in conformity with international human rights standards and norms.

For the above reasons, the African Commission,

Finds the State of Eritrea in violation of Articles 2, 6, 7(1) and 9(2) of the African Charter on Human and Peoples' Rights;

Urges the State of Eritrea to order the immediate release of the 11 detainees, namely, Petros Solomon, Ogbe Abraha, Haile Woldetensae, Mahmud Ahmed Sheriffo, Berhane Ghebre Eghzabiher, Astier Feshation, Saleh Kekya, Hamid Himid, Estifanos Seyoum, Germano Nati, and Beraki Ghebre Selassie; and

Recommends that the State of Eritrea compensates the abovementioned persons

*Done at the 34th Ordinary Session of the African Commission
held from 6th to 20th November 2003, in Banjul, The Gambia*

⁴⁸ Communication 232/99 – John Ouko/Kenya

*COMMUNICATIONS
DECLARED
INADMISSIBLE*

248/2002 Interights and World Organisation Against Torture/Nigeria

Rapporteur:

31st Session: Commissioner Dankwa

32nd Session:

33rd Session: Commissioner Dankwa

34th Session: Commissioner Dankwa

35th Session: Commissioner Dankwa

Summary of Facts

1. The complaint is filed by Interights and the World Organisation Against Torture/Organisation Mondiale Contre la Torture on behalf of individuals who requested anonymity as permitted under Article 56(1) of the African Charter.
2. In their complaint, the complainants allege that between May 1999 and March 2002, the Federal Republic of Nigeria has engaged in extra-judicial executions, state-sponsored violence and impunity.
3. The complainants allege that during the said period, the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the extra-judicial execution of cumulatively over ten thousand persons at different locations in Nigeria.
4. They allege that the Federal Republic of Nigeria has directly, through its armed forces, members of its law enforcement agencies and similar officials of the state, participated or been complicit or implicated in the verifiable and forcible internal displacement of over one million persons in Nigeria.
5. They allege that the Federal Republic of Nigeria has systematically and deliberately in all the cases of extra-judicial execution and forcible displacement, denied the victims access to remedies in violation of its obligations under the African Charter. It has, by reason of all these violations over a period of more than two and a half years, committed systematic, serious and massive violations of human and peoples' rights recognised by the African Charter on Human and Peoples' Rights which is domestic law in Nigeria.
6. The authors of the complaint allege that they have independently verified the allegations described in the complaint. They assert that the epidemiology of the violations described in the complaint precluded the requirement to exhaust domestic remedies in Nigeria. They cited the decision of the Commission on admissibility in the Communication 25/89 *Free Legal Group et al v. Zaire* wherein the Commission held that the requirement of exhaustion of local remedies need not be applied literally "in cases where it is impractical or undesirable for the individual complainant to seize domestic courts in the cases of each individual complainant. This is the case where there are a large number of individual victims. Due to the seriousness of the human rights situation as well as the great numbers of people involved, such remedies as might theoretically exist in the domestic courts are, as a practical matter, unavailable or, in the words of the Charter, unduly prolonged."

Complaint

7. The Complainant alleges violation of Articles 1, 2, 3, 4, 5, 7(1), 12 (1), 13(1), 13(2), 14, 15, 16, 17(1), 17(2), 18, 25 and 26 of the African Charter on Human and Peoples' Rights.
8. In their prayers for redress, the complainants request the Commission to:
 - undertake an independent investigation and verification of the violations being complained of;
 - request, pending its decision on this communication, its Special Rapporteurs on Human Rights of Women, on Summary, Arbitrary and Extra-Judicial Executions, and on Prisons to undertake a joint investigation of violence, extra-judicial executions and related violations in Nigeria and to request the government to accede to the conduct of such an investigation;
 - request the government to verify the number and manner of death of all victims of extra-judicial executions during the period covered by the communication;
 - request the government to provide adequate and appropriate remedies to the victims of violations alleged in this communication, including, in particular, the prosecution of all persons implicated in the violations;
 - request the government to adopt and implement such measures as may be indicated by the Commission to prevent recurrence of the violations complained of in this communication; and
 - request the government to report periodically to the Commission on steps taken by it to comply with the finding and remedies indicated by the Commission.

Procedure

9. The Complaint, dated April 2002, was sent on 4th April 2002, and received at the Secretariat on 5th April 2002.
10. At its 31st Ordinary Session held from 2nd – 16th May 2002 in Pretoria, South Africa, the African Commission considered the complaint and decided to be seized thereof.
11. On 28th May 2002, the Secretariat wrote to the complainants and Respondent State to inform them of this decision and requested them to forward their submissions on admissibility before the 32nd Ordinary Session of the Commission.
12. At its 32nd, 33rd and 34th Ordinary Sessions, the communication was deferred to enable the parties make submissions on admissibility.
13. At its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, 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 unduly prolonged*".
15. The Complainants' claim that theirs is a special case in which they assert that, by the jurisprudence of the African Commission, the epidemiology of the violations described precluded the requirement to exhaust domestic remedies. Despite this, however, the African Commission had decided, at its 32nd, 33rd and 34th Ordinary Sessions, that both parties should forward their written submissions on admissibility.
16. Despite several reminders, the Complainants, in particular, have not furnished their written submissions on admissibility. Consequently, the African Commission holds that the Complainants have not shown if they have exhausted local remedies as required by the African Charter.

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 35th Ordinary Session held in Banjul, The Gambia
from 21st May to 4th June 2004*

256/2002 – Samuel Kofi Woods, II and Kabineh M. Ja’neh/Liberia

Rapporteur:

32nd Session:

33rd Session: Commissioner Dankwa

34th Session: Commissioner Dankwa

Summary of Facts

1. The complaint is filed by Mr. Samuel Kofi Woods, II and Mr. Kabineh M Ja’neh on behalf of Hassan Bility, Ansumana Kamara and Mohamed Kamara, all Liberian journalists for the independent Analyst Newspaper in Monrovia.
2. The Complainants allege that in the afternoon of 24 June 2002, plain-cloth state security officers from the National Police Force, National Security Agency, National Bureau of Investigation, Fire Service, Immigration, Ministry of Defence, Anti-Terrorist Unit, Special Security Service, and Ministry of National Security arrested Hassan Bility, Ansumana Kamara and Mohammed Kamara, all journalists working for the independent Analyst Newspaper in Monrovia.
3. The complaint also alleges that the said arrest and detention of the journalists was not disputed as the Minister of Information, Mr. Reginald Goodridge has confirmed the same. To date, there was no charge proffered against them and they continue to languish in detention, which is in contravention of the African Charter, the Constitution of Liberia and the Universal Declaration of Human Rights (UDHR).
4. It is alleged that in consideration of the available constitutional local remedies vis-à-vis the arbitrary arrest and detention of these journalists, and further to the petition filed by an assortment of human rights organisations in Liberia filed a petition at the First Judicial Circuit Court, Criminal Assizes “B” of Montserrado County, the latter issued a Special Writ of Habeas Corpus, which, however, was allegedly not complied with.
5. The Complainants further allege that the subsequent announcement by the Liberian Government of its intention to arraign the detained journalist before a military tribunal would restrain, deprive and deny them of their human rights to liberty, freedom and due process of laws as enshrined in the Liberian Constitution, the African Charter, and the UDHR.
6. Together with their complaint the Complainants submitted a request for provisional measures to the African Commission in accordance with Rule 111 of the Rules of Procedure of the African Commission.

Complaint

7. The Complainants allege violations of Articles 6, 7(b), and 7(d) of the African Charter on Human and Peoples’ Rights.
8. The Complainants pray that in addition to provisionally ordering the immediate release of the detainees in consonance with Rule 111 of the Rules of Procedure of

the African Commission, the Commission grant any and all other remedies/redress that it shall deem right and appropriate.

Procedure

9. The Complaint was dated 9th August 2002 and received at the Secretariat on 16th August 2002 by post.
10. 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.
11. On 23rd October 2002, the African Commission appealed to His Excellency Charles Taylor, President of the Republic of Liberia, respectfully urging him to intervene in the matter being complained of pending the outcome of the consideration of the complaint before the African Commission.
12. On 4th November 2002, the Secretariat wrote to the Complainants and Respondent State to inform them that the African Commission had been seized of the communication and requested them to forward their submissions on admissibility before the 33rd Ordinary Session of the Commission.
13. The Secretariat requested the parties on several to submit their arguments on admissibility.
14. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission considered this communication and declared it inadmissible.

LAW

Admissibility

15. 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*".
16. The Complainants have, despite repeated requests, however, not furnished their submissions on admissibility, especially on the question of exhaustion of domestic remedies.

For this 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 34th Ordinary Session held in Banjul, The Gambia,
from 6th to 20th November 2003*

258/2002 - Miss A /Cameroon

Rapporteur

32nd Ordinary Session: Commissioner EVO Dankwa /Angela Melo

33rd Ordinary Session: Commissioner EVO Dankwa/Angela Melo

34th Ordinary Session: Commissioner EVO Dankwa/Angela Melo

35th Ordinary Session Commissioner Angela Melo

Summary of Facts

1. On 21st August 2002, the Secretariat of the African Commission on Human and Peoples' Rights (the African Commission) received from Miss A, a Cameroonian citizen, a communication relative to the provisions of Article 55 of the African Charter on Human and Peoples' Rights (the African Charter). Miss A submitted the communication for and on behalf of her father and co.
2. The communication was submitted against the Republic of Cameroon (a State Party⁴⁹ to the African Charter) and Miss A alleged in the communication that her father and two colleagues, former workers of the Cameroon P & T were arrested and detained in 1998 by the police, as conspirators of the Minister of P & T, who was also arrested and detained for alleged corruption.
3. The Complainant further alleged that since 1998, when her father and two of his colleagues have been in detention, they have never been formally charged, they have never appeared in court and never had access to a lawyer. The Complainant added that the State did not appear to have any intention to try them in the foreseeable future, whereas the delicate health of her father required constant medical attention.

Complaint

4. Miss A contends that the above-described facts constitute a violation by Cameroon of Articles 2, 3, 5, 6, 7, 10, 11, 12 and 26 of the African Charter, and requests the African Commission to -:
 - a) Ask Cameroon take appropriate measures in order to avoid irreparable damage to the health and well being of the said detainees;
 - b) Pronounce the Government of Cameroon in violation of the African Charter and other international human rights treaties;
 - c) Request Cameroon to bring the accused persons to trial immediately or order their release;
 - d) Request the erring State to compensate her father and his co-detainees for the period they have been in detention.

Procedure

5. By letter ACHPR/COMM/258/2002 of 23rd August 2002, the Secretariat of the African Commission acknowledged receipt of the communication and informed the sender that it would be tabled for consideration *prima facie* at its 32nd Ordinary Session.

⁴⁹ Cameroon ratified the African Charter on 20/06/1989.

6. During its 32nd Session, held from the 17th to 23rd October 2002 in Banjul, The Gambia, the Commission considered the communication and decided to be seized of it.
7. On 22nd October 2002, the Chairman of the Commission sent a letter of requesting the urgent intervention of the President of the Republic of Cameroon, drawing his attention to the situation of the two detainees and in particular on their state of health and urged the Head of State to ensure that appropriate medical care is provided for the detainees. The Chairman of the Commission also requested in his letter that the detainees be charged and given a fair trial or freed in case no charge is made against them.
8. On 28th October 2002, the Secretariat of the Commission sent a Note Verbale to Cameroon informing it of the communication against it and the decision of seizure that the Commission had taken on it. Cameroon was further requested to provide the Commission with its arguments on the admissibility of the case, which the Commission intends to consider at its 33rd Session (5-19 May 2003, Niamey, Niger).
9. On the same date, the Secretariat of the Commission sent a letter to the Complainant informing her of the decision of seizure that the Commission had taken on her case as well as of the letter for urgent intervention that the Chairman of the Commission had sent to the President of the Republic of Cameroon at her request. The Complainant was also requested to furnish the Commission with possible arguments on the admissibility of the case, which the Commission intended to consider at its 33rd Session.
10. Having received no reply from the Respondent State, the Secretariat of the Commission sent it a reminder on 10th February 2003 drawing its attention to the fact that its written submissions on the case should reach the Commission as early as possible to allow the Commission take a decision on admissibility of the case. The Secretariat is yet to receive a reaction from the Respondent State.
11. On 20th October 2002, the Complainant sent a letter to the Commission requesting it to defer consideration of the communication to allow her to acquire more information on the case from the victims' lawyers.
12. On 21st October 2002, the Secretariat of the Commission acknowledged receipt of the Complainant's request for deferment, and informed her that in accordance with her request consideration of the communication would be deferred until the 35th Ordinary Session of the ACHPR.
13. At its 34th Ordinary Session held in November 2003 in Banjul, The Gambia, the African Commission formally decided to defer its decision on the admissibility of the complaint, in accordance with the request of the Complainant.
14. By Note Verbale ACHPR/COMM 2²58/2002 OF THE 15/11/2003, the Secretariat of the African Commission handed to the delegation of Cameroon participating at the 34th Session a copy of the said complaint. The Note Verbale further requested Cameroon to convey its comments with regard to the admissibility of the matter within three months and in any case before end

February 2004, to enable the Commission to make a well informed ruling on the communication at its 35th Ordinary Session.

15. On the 17/02/2004, the Ministry of Foreign Relations of Cameroon sent a letter to the African Commission in which the Respondent State intimated that Mr. Ndeh Ningo had been acquitted and freed in November 2003, “for lack of criminal charges” whilst Mr. Takang Philip had been freed in March 2003 “for non-proven facts”.
16. Extracts of the judgement letter indicated the acquittal and liberation of the two individuals as well as the respective arrest warrants which had been attached to the documents mentioned earlier.
17. The Respondent State therefore requested the Commission to declare the communication inadmissible “in view of the presentation of the above mentioned documents, which sufficiently prove that the two cases had been submitted to the legal Authorities of Cameroon and had been dealt with”.
18. On the 01/03/2004 the Secretariat of the African Commission, through its Note Verbale ACHPR/COMM 258/02 acknowledged receipt of the Note Verbale from the Respondent State.
19. By letter ACHPR/COMM 258/02/RK of the 1st /03/2003, the Secretariat of the African Commission had conveyed the Note Verbale to the Complainant requesting her reaction on the contents of the letter.
20. On the 14/04/2004, the Complainant wrote to the Secretariat of the African Commission to confirm the liberation of Mr. Ndeh Ningo who had been “judged not guilty and freed on the 23/11/2003 after having spent 4 years in detention”.
21. The Complainant indicated in her letter that Mr. Ndeh Ningo would advise the Commission on whether or not he would pursue the matter at the level of the Commission. The Complainant further mentioned the possibility of holding negotiations with the Respondent State to obtain compensation for Mr. Ndeh Ningo. For this reason the Complainant requested the African Commission to kindly defer its decision on the admissibility of the communication until its 36th Ordinary Session and not to declare it inadmissible as per the request of the Respondent State.
22. During its 35th Ordinary Session held from 21st May to 4th June 2004 in Banjul, The Gambia, the Commission considered the communication and declared it inadmissible.

LAW

Admissibility

23. Article 56 of the African Charter on Human and Peoples’ Rights provides *inter alia* that communications shall be considered by the Commission after exhausting local remedies, unless this procedure is unduly prolonged.

24. In the case under consideration, the African Commission notes that the alleged victims were tried and freed in March and November 2003 respectively. This fact was admitted both by the Complainant and Respondent State.
25. The African Commission took note of the fact that the case was brought to the African Commission at the time that the matter was still before the courts. Furthermore, the fact that the case was tried properly before a court of law shows the availability of local remedies.
26. The African Commission further took note of the fact that the Complainant intends to meet with the Respondent State and start negotiations with a view to claim compensation for and on behalf of the alleged victims.

For this reason, 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 35th Ordinary Session held in Banjul, The Gambia
from 21st May to 4th June 2004*

*COMMUNICATION
WITHDRAWN BY THE
COMPLAINANT*

Rapporteur:

34th Ordinary Session – Commissioner Nyanduga

35th Ordinary Session – Commissioner Nyanduga

Summary of Facts

1. The communication is submitted by a Complainant who requests anonymity and presents the facts of the case as follows -:
2. The Complainant alleges that on 30th September 2003, the Anti-Corruption Committee presented a report on corruption in the judiciary to the Chief Justice of Kenya in the presence of the press. The Report also known as the *Ringera* Report reveals shocking and endemic corruption in the judiciary and further lists the names of the Judges alleged to have been involved in corrupt and unethical practices in the course of performing their duties.
3. On 4th October 2003 during a press conference, the Chief Justice without naming the judges is alleged to have given the said judges a two-week ultimatum to resign or face trial. Two days later, the Constitutional Affairs Assistant Minister is reported to have reiterated the deadline issued by the Chief Justice and warned that judges who ignore the deadline would face tribunals and prosecution for crimes committed.
4. The Complainant states that the Kenya Magistrates and Judges Association was quoted in the press as saying “we urge the judicial administration to inform those affected so that they can decide on their next course of action not forgetting the need for confidentiality”. However, the Complainant claims that over the following several days none of the judges named in the report were informed of their presence on the list nor of the allegations leveled against them.
5. The Complainant avers that on 14th October 2003 it was reported through a six o'clock news broadcast that the President had appointed two tribunals to investigate the twenty-three judges whose names were announced during the broadcast as well as their suspension. The Complainant asserts that this is the first time that the judges learnt of their presence on the list and of their immediate suspension. The announcement however did not contain details of the allegations made against each judge. It is however reported in the *Daily Nation Newspaper* on 18th October 2003 that the police would question some of the judges before they appear before the tribunals and it is only during those interrogations they will be informed of the accusations against them and their statements taken.
6. The Complainant alleges that as of 17th October 2003, the judges had still not received details of the allegations made against them despite continued press coverage of the matter. Although maintaining their innocence, some of the named judges tendered their resignations or sought retirement.
7. The Complainant further submits that the Chair of the Law Society of Kenya on

18th October 2003 announced through the press that the Society would in two weeks' time release its report containing a list of judges other than those named in the Ringer Report.

8. The Complainant on the whole submits that failure to advise the judges mentioned in the *Ringer* Report of the allegations against them and to give them an opportunity to accept or dispute the allegations coupled with varied threats and warnings amounts to harassment and hounding of judges thereby undermining the principles of security of tenure and the independence of the judiciary.
9. Furthermore, the Complainant claims that the manner in which the whole matter was dealt with violates Articles 7 and 26 of the African Charter as well as other international human rights instruments namely the UN Basic Principles on the Independence of the Judiciary, the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights

Complaint

10. The Complainant alleges a violation of **Articles 7 and 26** of the African Charter on Human and Peoples' Rights.

Procedure

11. The communication was faxed and received at the Secretariat of the African Commission on 21st October 2003. The Complainant also requested the African Commission to take Provisional Measures under Rule 111 of the Rules of the African Commission to ensure that the process of removal of judges does not interfere with independence of the judiciary and the right to a fair hearing.
12. The Secretariat of the African Commission on 24th October 2003 forwarded a copy of the communication as well as a draft Appeal Letter to the Chair of the African Commission and requested him to take necessary action.
13. By email dated 28th October 2003, the Chair of the African Commission wrote advising the Secretariat that since the matter would be handled as a communication at the African Commission's forthcoming 34th Session, an Appeal Letter should not be sent to the government of Kenya until after the African Commission had examined the matter and determined what course of action to take.
14. On 31st October 2003, the Secretariat of the African Commission wrote to the Complainant acknowledging receipt of the communication.
15. At its 34th Ordinary Session held from 6th to 20th November 2003 in Banjul, The Gambia, the African Commission examined the communication and decided to be seized of the matter.

16. On 4th December 2003, the parties to the communication were informed accordingly and requested to forward their written submissions on admissibility of the communication within 3 months.
17. On 15th March 2004, the parties to the communication were reminded to forward their written submissions on admissibility to the Secretariat.
18. By email dated 16th March 2004, the Secretariat received a letter from the Complainant withdrawing the matter as she believed that the matter was now being addressed by the Respondent State.
19. On 25th March 2004, the Secretariat received the Respondent State's submissions on admissibility and acknowledged receipt of the same on 26th March 2004.
20. By letter dated 26th March 2004, the Secretariat acknowledged receipt of the Complainant's letter withdrawing the communication and also forwarded a copy of the Respondent State's submissions on admissibility.
21. At its 35th Ordinary Session held in Banjul, The Gambia, the African Commission considered this communication and decided to close the file.

Respondent State's submissions on admissibility

22. The Respondent State provides a background against which it undertook the judicial reforms which have in part given rise to this communication. They argue that a well functioning judicial system is crucial to improving governance, combating corruption and consolidating the democratic order, thereby fostering economically sustainable development. Therefore, a judicial system with integrity should be free from political and external interference. Furthermore, judicial independence must be balanced by accountability in order to facilitate transparency within the system and control of corruption.
23. It is submitted by the Respondent State that the tendency towards corruption and abuse of power among certain members of the judiciary in Kenya has been lamented over time. As such, one of the key objectives of the Kenyan government has been to undertake judicial reform in order to develop an impartial, independent, accountable and effective judiciary that is able to improve governance and advance development in the country.
24. The Respondent State contends that the communication does not meet the requirements in Article 56(2), (4) and (5) of the African Charter.
25. It is submitted that the communication is substantially based on newspaper reports and is therefore not founded on factual realities of the case contrary to Article 56(4) of the African Charter.
26. The Respondent State further submits that the Complainant did not even attempt to exhaust local remedies in their case as required by Article 56(5) of the African Charter. In this regard, the Respondent State argues that the national legal framework in Kenya is adequate to address the concerns raised by the Complainant and should have therefore been utilised. For instance, the concerns

raised by the Complainant could have been addressed through, the constitutional provisions or national statutes like the Public Officer Ethics Act 2003, The Anti Corruption and Economic Crimes Act 2003. Furthermore, local judicial action and remedy is available to the judges, should any of the procedures adopted be deemed illegal or in any case *ultra vires*.

27. The Respondent State reports that the judges are not on trial as understood but that special investigative tribunals were set up to determine issues touching upon the behaviour and ability of the judges implicated to perform the functions of their office. 23 judges from both the Court of Appeal and High Court of Kenya were involved and were investigated within 14 days of the presentation of the *Ringeru* Report. The Tribunals started sitting on 9th and 16th February 2004.
28. Confidentiality was assured for the affected judges in the initial stages and at all crucial times. Only broad categories of alleged offences were highlighted in the media. The Respondent State argues that it was therefore possible for a judge to privately and conscientiously place him/herself into any of the categories and make a personal decision to resign or appear before the tribunals. Consequently, majority of the judges mentioned opted for early retirement with full benefits as a result.
29. In any case, the Respondent State argues, that the Judges had the option within the laws to challenge the process before the High Court should they be aggrieved by it but none of the said judges opted for the judicial remedy.
30. The Respondent State maintains that the domestic legislation of Kenya is in consonance with both the letter and spirit of international law including the UN Basic Principles on the Independence of the Judiciary and asks the African Commission to declare the communication inadmissible.

Reasons given by the Complainant for withdrawing the communication

31. The Complainant wrote to inform the African Commission that they received information that the Registrar and Chief Justice did not authorise the leaking of the names of the implicated judges to the press and that this particular matter was now being investigated by the judiciary. Furthermore, the issue of a fair trial in light of the publicity created prior to the suspension of the judges had been raised before the Tribunals and that the matter was being handled and could end up with the Constitutional courts of Kenya.
32. It is for this reason that the Complainant wishes to withdraw the communication.

The African Commission takes note of the withdrawal of the communication by the Complainant and for this reason decides to close the file.

*Done at the 35th Ordinary Session held in Banjul, The Gambia,
from 21st May to 4th June 2004*

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